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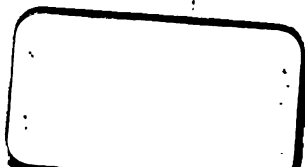


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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF NEW YORK,

WITH
Copious Notes and References.

~~~~~  
By GEORGE CAINES,  
COUNSELLOR AT LAW.  
~~~~~

THIRD EDITION,
CAREFULLY REVISED AND CORRECTED,

WITH
ADDITIONAL NOTES EMBRACING THE MORE RECENT DECISIONS.

By WILLIAM G. BANKS,
COUNSELLOR AT LAW.

IN THREE VOLUMES.

VOL. I.

BANKS & BROTHERS, LAW PUBLISHERS,
NEW YORK: No. 144 NASSAU STREET.
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1883.



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PREFACE

TO THE

THIRD EDITION



THE State of New York, from the first organization of her judiciary, has attracted, both in England and the United States, profound attention and deference, for her wise and sagacious laws, and the dignity, learning, and uprightness of her courts. Her legal decisions have always been considered the highest authority. Her law reports are perennial fountains of an enlightened jurisprudence; and probably no case of any magnitude in any section of this country, would be discussed, much less decided, without reference to them.

Such being the importance and utility of the New York reports, it is desirable that the sets should be complete, from the earliest period down to the present time; and the publishers have great pleasure in announcing that the present issue of Caines will accomplish this result.

The reports of Mr. Caines, although among the earliest of similar publications in this country, have an extended and permanent reputation. Their celebrity is owing in part to the great learning and ability of the court, composed of such judges as Kent, Lewis, Thompson, Van Ness and Spencer, and in part to the accuracy and perspicuity of the talented reporter himself.

The original work of Mr. Caines was enriched by him, with copious notes, of much interest, and great practice.

value. These notes are retained without alteration in the present edition; and other notes supplementary to those already in the work have been added, with a view of introducing all the latest decisions.

In presenting to the public a third edition of Caines, the publishers have only responded to repeated and urgent calls for it by the profession; and they now issue it in such a way as to enable them to supply the demand, however great.

New York, March 1st, 1854

PREFACE

TO THE SECOND EDITION.



A SECOND edition of the following reports being called for, they are now offered to the profession with some alterations, and, it is hoped, with some amendments also. To remove every fault, by casting the whole work in a new mould, has not been attempted. There are therefore imperfections in the original execution which still remain. These were the necessary results of a mistaken deference to the statement of the cases as furnished on the arguments, and a fear of expunging from the opinions of the bench, any part of what had been publicly delivered.

Encouraged by legislative patronage, and a permission to exercise his own discretion, the author, in the second volume, began a little to dress the cases in his own language, and to discard from the opinions of the judges the statement of facts, by which they were, when delivered, in general preceded. It is therefore believed, that in the second and third volumes the defects of the first have been, for the most part, avoided; and, it is presumed, that even in the first, they are now in a great degree corrected.

The marginal extracts of the principles of the decisions have been left untouched. They have been, on mature reflection, deemed far more useful than the algebraical report of the case, through the aid of all the letters in the alphabet, lately adopted by Mr. *East* and others, concluding with a "*held*," &c. leaving to the student the labor of separating the gold from the dross.

The decisions referred to from the MSS. of *Kent*, Ch. J. were taken by the author from manuscript notes lent to him, while reporter, by the Chief Justice in the intervals

of court during term, but of which, from the facility afforded by writing short hand, the author was enabled to copy nearly the whole. The cases reported in 2 *Caines' Cases in Error* were given to him by Mr. *Coleman* on his quitting the bar, and had been furnished to him by the bench with a view to their being printed. Most of them have been since published in Mr. *Johnson's Cases*; those which were misreported, correctly; the matter of the others either a little added to, or the phraseology a little varied.

GEORGE CAINES.

8th April, 1818.

PREFACE

TO THE FIRST EDITION.

IN a jurisprudence where the judgments of the past are to regulate those of future times; where that which has been, is to form the rule of that which is to be, the utility and importance of transmitting, to those who are yet to come, decisions of our days, to be acknowledged, need only be named. The inconveniences resulting from the want of a connected system of judicial reports, have been experienced and lamented by every member of that profession for whose use the following sheets are peculiarly designed. The determinations of the court have been with difficulty extended beyond the circle of those immediately concerned in the suits in which they were pronounced; points adjudged have been often forgotten, and instances might be adduced where those solemnly established, have, even by the bench, been treated as new. If this can happen to those before whom every subject of debate is necessarily agitated and determined, what must be the state of the lawyer, whose sole information arises from his own practice, or the hearsay of others? Formed on books, the doctrines of which have in many respects been wisely overruled, he must have frequently counselled without advice, and acted without a guide. To alleviate these embarrassments, and disseminate that which it concerns all to know, the following Reports have been undertaken. Their continuance will be regular by quarter-annually publishing in each vacation the decisions of the last preceding term.

The reporter would ill deserve the favors he has received did he not in the fullest manner avow their extent. Their Honors on the bench, with a kindness and warmth of encouragement, for which far more is felt than it is possible

to express, have unreservedly given their written opinions, and the whole bar has frankly and generously afforded their cases, and every other communication that was wished or desired. To these aids the clerk of the court has added an unlimited recurrence to the papers and pleadings his office contains.

From this enumeration of assistance it will appear that the reporter's exertions have been reduced to little more than arranging the materials received, and giving, in a summary manner, the arguments adduced. In stating these it has been necessary to condense; to shorten, but not deviate from the path counsel have been pleased to elect. So little has this been done, that in some instances, it has been thought right to tread in their steps, and the very words have been adhered to, because they have been considered as mirrors reflecting the case, without which it would often be impossible to behold it in the light represented to the bench. To omit altogether what the advocate has urged, and specify his points alone, has more than once been suggested; but believing the reasonings of the barrister to form the link which connects the case with the decision, it was thought impossible, without in some degree preserving the language of the pleader, to do justice to either. Notwithstanding every endeavor to render this, it must be confessed that it has not always been accomplished; and the eloquent in the law will often have to regret the inadequacy of their reporter. For this their forgiveness is entreated: the fault is not in the man, but the nature of the thing. Where is the original that in the copy has not lost fire and colour? With this apology the reporter takes his leave of a bar to whom he is, in every sense of the word, truly obliged.

GEORGE CLARK.

New-York, February, 1804.

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C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW YORK,
IN MAY TERM, IN THE TWENTY-SEVENTH YEAR OF OUR INDEPENDENCE.

BOGERT and LEWIS, Executors of BOGERT, *against* HIL-
DRETH, Sheriff of Montgomery.

In an action for an escape from prison in one county, that the judgment on which the suit against the prisoner was founded is of record in another county, is not such a *substratum* as makes the action local where the judgment is recorded.

Quare, if the county where an escape happens be not the proper county for the *venue*?

THIS was an action for an escape from execution. The *venue* was laid in the city of New-York.

The defendant, at a former term, on an affidavit stating the cause of action (if any) to have arisen in the county of Montgomery, and adding that his witnesses, who were numerous, resided in that county, moved to change the *venue* from New-York to Montgomery.

It was then contended, that this action was so far local that the plaintiff was bound to lay the *venue* in the county

Bogert v. Hildreth.

where the prisoner had escaped; but the court was of opinion that the suit was transitory; that the plaintiffs had a right to lay the *venue* where they pleased, in the first instance, and the defendant enjoyed the common privilege of changing it on the usual affidavit. A rule was, therefore, made, that the *venue* should be changed from the city of New-York to Montgomery, unless the plaintiffs, within twenty days, should stipulate to give, on trial, material evidence, arising in the city of New-York. The plaintiffs did stipulate accordingly, and transmitted a notice of it to [*2] the *defendant's attorney, by mail, to Johnstown, in Montgomery county; four days after which, and before, according to the course of the mail, the defendant could have received the notice, he pleaded in bar fresh pursuit and recaption before action brought

Riggs now moved, that the plaintiff be discharged from his stipulation, on the grounds, first, that the *substratum* of the action being the judgment against M'Donald, which was filed in New-York, the cause of action arose there;(a) and, secondly, that the defendant, having pleaded before he received notice of the stipulation, had waived(b) the rule for changing the *venue*.

LIVINGSTON, J., delivered the opinion of the court. This is a motion to vacate a rule entered the last term, "for changing the *venue* to Montgomery, unless the plaintiffs would undertake to give evidence material to the issue arising in the city and county of New-York." It is now said, that the court committed an error in changing the

(a) See *Mellor v. Barber*, 3 D. & E. 387. *Pinkney v. Collins*, 1 D. & E. 571. *Chissold v. Chissold*, Ibid. 647.

(b) *Talmash v. Penner*, 3 Bos. & Pull. 12; pleading, pending a rule nisi to change the *venue* no waiver, and the *venue* changed. Nor taking out a summons for further time to plead. *Wilson v. Harris*, 2 Bos. & Pull 320. *Shipley v. Cooper*, 7 D. & E. 698. *Moss v. Stevenson*, 1 Taun. 58. Post. vol. II p. 379.

Bogert v. Hildreth.

venue; because, there being matter of law and matter in *pais*, material to the issue, in different counties, the plaintiff might elect to lay his action in either; and that, in such cases, it cannot be changed, unless for urgent or particular reasons. This rule, when well understood, is a salutary one, but it does not apply to this case; it means, that when official acts are done by the defendants in several counties, some of which are matters of record, and others of fact, there the plaintiff has his election. Thus, in the case of *Griffith v. Walker*, 1 Wils. 336, which was an action against the sheriffs of Radnorshire, for a false return to a *scire facias*, the *venue* of which was laid in Herefordshire, it was alleged, ~~on demurrer~~, that the action ought to have been laid in Radnor, because, whatever acts the sheriff does officially, must be done in his own county, or at least, the law supposes them done there; but the court said, the sheriff may endorse his writ anywhere; and, as it is alleged that he did this in Herefordshire, the plaintiff has his election to lay his action where he can prove the *fact done*. Here the return was matter of record, but it is not on that account merely that this election is given, but because the sheriff was the party *who made that return, which was the gist of the suit*. If this return had, afterwards, been filed (as was no doubt the case) in the office of the court of king's bench, it would not have justified the laying of the *venue* in that county. In the case before us, it is said that [*3] the judgment roll against the party who escaped, is filed in an office kept in the city and county of New-York, and, therefore, the *venue* cannot be changed. This judgment was no act of the sheriff's, and, therefore, not like the case of a return made by him in a particular county. Nor is it the ground of this action, which is, emphatically, the escape from the gaol of Montgomery.

A principal reason for permitting a plaintiff to retain the *venue* where he has laid it, arises from the circumstance of his having material witnesses there. This rule should not be abused by too much refinement. If the recovery against

Bogert v. Hildreth.

the party who has escaped must be given in evidence on the trial, it may be done by exemplification, which is the proper way; and this may be carried without expense to Montgomery. *Bulwer's Case*, in 7 Co. 1, only determines, and that on demurrer, that an action for maliciously outlawing the plaintiff might be laid in the county where the *capias uilagatum* was executed; and not necessarily in Middlesex, where the wrong was commenced by issuing the *capias ad satisfaciendum*. This decides nothing; for although the plaintiff may, in many cases, in the first instance, choose his *venue*,^(a) it does not follow that the defendant shall not change it, or that the court would not, in that very case, have changed it; on the common affidavit. The case of *Cameron v. Gray*, in 6 Term Rep. 363, is subsequent to the revolution, nor can the facts be all disclosed. Lord *Kenyon* would hardly have said (and yet such is the effect of that decision) that all actions for infractions of patent rights are local, and must be tried at Westminster, solely because the patent, which is its *substratum* issued there. If this be his meaning, we are at liberty, considering the date of this case, to differ from his lordship; and it appears to us, with due deference, that the county in which the right of the patentee was invaded, was the proper theatre of trial; for there, and not elsewhere, the cause of action arose. So, in an action for an escape, unless particularly circumstanced, many reasons occur why a trial should be had in the county from which the prisoner fled. A sheriff ought not lightly to be called out of his county; the witnesses also must, generally speaking, be there; nor should a public officer be subject to the oppression and expense of attending, with his witnesses, at a distance. Yet we are now called [*4] on, not only to sanction *this practice in one case, but to render it universal and permanent; or, in other words, to declare that every sheriff, however distant

(a) See *Gilbert v. Martin*, 1 Lev. 114, 286, *Mayor of Berwick v. Buart*, 2 Black. 1069.

The first of these is the fact that the
 defendant has been found guilty of the
 crime of which he is accused. This is a
 fact which cannot be denied. The second
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 This is a fact which cannot be denied. The
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 Bogert v. Hildreth.

able to the plaintiff as he had any reason to expect, and ought not to be disturbed.

RADCLIFF, J.,(a) concurred, observing, however, that, according to the English practice, he took the rule to be, that, where evidence material to the plaintiff's action arises in different counties, the plaintiff has a right to elect the county in which to lay his *venue*, and to keep it there; that the rule is the same, whether the evidence consist of matters *in pais* in each county, or of record in one, and *in pais* in another. Pursuing that practice, the plaintiffs would be entitled to retain the *venue* in New-York. But he thought this a question in which we had a right to prescribe a rule for ourselves. Applications to change the *venue* must, in general, rest in the discretion(b) of the court, and be regulated by the circumstances of the case.

Motion denied.

(a) Who referred to the following authorities: 7 Co. 1. *Baker's Case*, Cro. Eliz. 574. Wils. 336. Plowd. 37. b. Sty. 107. 2 Bl. Rep. 240. 2 I. & E. 238. Ibid. 275. 6 D. & E. 363.

(b) To facilitate the ends of justice is the principle on which courts, in transitory actions, change the *venue*. Therefore, if the cause of action wholly arise, or the defendant's witnesses reside, in another county, (*Allen v. Brack*, post, 107. *Low v. Hallett*, 2 Caines. 374. *Metcalf v. Clark and Watkins*, 5 Johns. Rep. 361. *Foster v. Taylor*, 1 D. & E. 781. *Holmes v. Wainwright*, 3 East, 329,) the *venue* will be changed. Though it is said that the defendant must also stipulate to give evidence of some material fact happening in the county to which he moves to carry the suit. *Gourley v. Shoemaker*, 1 Johns. Cas. 392. When, therefore, the defendant's witnesses reside in a county adjoining, or near to that in which the *venue* is laid, it will not be changed. *Mumford v. Camman*, 3 Caines' Rep. 139. *Gerard v. Floyd*, 1 Sid. 185. And as the power which the court exercises over *venues* is the result of its equitable jurisdiction, when the plaintiff offers to bear the expense of conveying the defendant's witnesses to the place of trial, (*Worthy v. Gilbert*, 4 Johns. Rep. 492,) or his witnesses reside where the *venue* is laid. *Du Boys v. Frank*, 3 Caines' Rep. 95. *Manning v. Downing*, 2 Johns. Rep. 453. *Stoutenberg v. Legge and others*, 2 Johns. Rep. 481,) or in a third county, (*Spencer v. Hulbert*, 2 Caines' Rep. 374. *Clark v. Reed*, cited 1 East, 33. S. C. 1 N. R. 310,) or the plaintiff show the defendant's affidavit to be untrue, from the cause of action arising in more counties than one, and will undertake to give material evidence in one or the other, (*Hunt v. Bridge*

 Townsend v. The New York Insurance Company.

TOWNSEND against THE NEW-YORK INSURANCE COMPANY.

If notice of applying for a commission specify names of commissioners, and the party served do not then object, he is concluded.

Quære, whether costs should not follow on applications for time?

MOTION for a commission to examine.

This cause had been once deferred, for want of testi-

ford, 1 Tann. 259,) the *venue* will not be changed. See *Woods v. Van Ranken*, post, 122.

The New York Code of Procedure (secs. 123-6) provides: Actions for the following causes, must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial, in the cases provided by statute:

1. For the recovery of real property or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property:

2. For the partition of real property:

3. For the foreclosure of a mortgage of real property:

4. For the recovery of personal property, distrained for any cause.

Actions for the following causes, must be tried in the county where the cause or some part thereof arose, subject to the like power of the court, to change the place of trial in the cases provided by statute:

1. For the recovery of a penalty or forfeiture imposed by statute; except, that when it is imposed for an offence committed on a lake, river, or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offence was committed:

2. Against a public officer or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person, who by his command or in his aid, shall do anything touching the duties of such officer.

In all other cases, the action shall be tried in the county in which the parties or any of them shall reside at the commencement of the action; or if none of the parties shall reside in the state, the same may be tried in any county which the plaintiff shall designate in his complaint; subject, however, to the power of the court to change the place of trial, in the cases provided by statute.

If the county designated for that purpose in the complaint, be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expire, demand, in writing, that it

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[*5] money, to acquire which a *commission had issued.

The defendants, afterwards, but previous to the last circuit, gave notice to the plaintiff that they should, on affidavits, (the copies of which were annexed,) move for a commission to examine witnesses, and specified the names of the commissioners. At the time of serving this notice, the defendants offered to stipulate not to delay the cause. The plaintiff did not assent to join in the commission, and, in a few days, gave the regular notice for trial. At the circuit an application was made to postpone the cause, on the usual affidavit of the want of that testimony, to obtain which, the commission noticed was to be sued out. The plaintiff's counsel objecting, he had till the next day to produce an affidavit of a former delay. Not doing this, the cause stood over of course.

Hoffman now moved for the commission.

Hamilton objected to its being directed to the commissioners named.

Per Curiam. The commissioners having been named in the notice of the motion, and the plaintiff having neither joined nor objected, is now concluded.(a)

trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the court, as is provided in this section.

The court may change the place of trial in the following cases:

1. When the county designated for that purpose in the complaint is not the proper county:

2. When there is reason to believe that an impartial trial cannot be had therein:

3. When the convenience of witnesses and the ends of justice would be promoted by the change.

When the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties, in writing duly filed, or order of the court, and the papers shall be filed or transferred accordingly.

(a) The objections should be made by affidavit, stating the facts on which grounded. *Biays v. Merrihue*, 3 Johns. Rep. 251.

 Clarkson v. Gifford.

Hamilton then argued against the application, because it was uncertain how long it would tie up the cause, and the defendants had not entered into any stipulation.

Per Curiam. It is unnecessary, for they take the commission at their peril; let it issue.[1]

Hamilton asked for the costs of the circuit.

THE COURT ordered them, and seemed to think that in all cases of delay, costs should follow.

On payment of costs of the circuit, motion granted.

 CLARKSON against GIFFORD.

in covenant of seisin, the *venue* will be changed to where the lands lie.

HARISON moved, on the usual affidavit, to change the *venue*.

Evertson. This action is founded on a specialty: in suits of this sort, the court does not change the *venue*.

Harison, in reply. The action is on a covenant of seisin, affecting, or, as the technical phrase is, savouring, of the realty.(a)

Motion granted.

[1] When party applying for commission must pay costs. *La Forge v. Luce*, 2 Wend. 242. *Jones v. Ives*, 1 Wend. 283. *Burr v. Skinner*, 1 J. C. 291.

When a commission will stay proceedings, and when stay will be vacated. *Ball v. Day*, 7 Wend. 513. *McVicar v. Woolcott*, 3 Cai. R. 321. *Nichol v. Col. Ins. Co.*, 1 Id. 345. *Pell v. Bunker*, 2 Id. 48. *Ferris v. Smith*, 2 Id. 253. *Shuter v. Hallett*, 1 Id. 115. *Kirby v. Watkins*, 1 Id. 503. *Coles v. Thompson*, 1 Id. 517. *Brain v. Redelies*, 1 Id. 73. *Burr v. Skinner*, 1 J. C. 391. *Rush v. Cobbet*, 2 Id. 70. *Maynard v. Chapin*, 7 Wend. 520. *Bourhereau v. Le Guen*, 2 J. R. 196. *Bank of Charleston v. Hurlbut*, 1 Sand. 717. 1 Code Rep. 128, S. G. *Voss v. Fielden*, 2 Sand. 680.

(a) The common law principle is, that demands arising from privity of as-

Griswold v. Stoughton.

[*6] *GRISWOLD and another *against* STOUGHTON.

If a default be regularly entered, and no excuse shown how it was incurred though the subsequent proceedings be set aside for irregularity, the default will stand, and plaintiff may perfect his judgment.

Though a default has been regularly entered, a rule for judgment is necessary, so that the clerk assess

ASSUMPSIT on a promissory note. The plaintiffs had proceeded under the statute, by filing common bail for the defendant, and had affixed the declaration with the demand of a plea in the clerk's office, without service on the defendant, who lives in the city of New York.

Judgment by default having been obtained,

Pendleton moved to set it aside, on an affidavit stating that no rules had been entered, either for interlocutory judgment, or for the clerk to assess damages on the note, offering at the same time to pay costs and put in special bail.

Riggs, contra. The proceedings are regular to the default; the affidavit states no excuse for that; and though

tate, are, in their nature, local, and must be sued for where the estate lies. Debt, therefore, for rent, as incident to the reversion, is local, (*Thrale v. Cornwall*, 1 Wils. 165,) if brought by the assignee of the lessor. So covenant if against the assignee of the lessee by the lessor, (*Stevenson v. Lamboard*, 2 East, 575,) or by the assignee of the reversion against the assignee of the lessee, or *vice versa*, the assignee of the lessee against the assignee of the reversion. For the only chain which connects these parties is the estate. But where the debt springs from privity of contract, as *debitum et contractus sum nullius loci*, the action is transitory. Therefore between lessor and lessee. (*Buhoer's Case*, 7 Term Rep 2. a) But as the statute (1 Rev. Laws, 105,) has transferred the privity of contract with respect to covenants which subsisted between lessor and lessee, to the assignee of the reversion and the lessee, those express covenants which run with the land, and were, by the common law, local, are now transitory. See *Thursby v. Plant*, 2 Saund. 237, notes (5) and (6). Case for a nuisance is local. *Warren v. Webb*, 1 Taun. 379.

See New York Code of Procedure, secs. 123 to 126, as given *ante*, p. 4.

Manhattan Company v. Herbert.

the subsequent steps are not according to strict practice, the defendant being in default, and that default regularly entered, is not entitled to favor. The utmost, therefore, the court will do, is to vacate the proceedings from the default.

Per Curiam. As the default is not accounted for by the affidavit, it is unimpeached, and therefore must stand: but as the subsequent proceedings are irregular, they must be set aside, with the usual liberty, however, for the plaintiffs to perfect their judgment this term, if they can.

Proceedings subsequent to the default set aside.

MANHATTAN COMPANY *against* HERBERT.

Trial by record to be on notice. See *Knap v. Mead*, Col. Cas. 122.

HOPKINS moved for a rule to bring on a trial by record.

Per Curiam. Trials by record are to be brought on by notice, in the same manner as cases for argument.[1]

[1] The New York Code of Procedure (secs. 252 and 256) provides: An issue of law must be tried by the court, unless it be referred, as provided in sections 270 and 271. An issue of fact, in an action for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract on the ground of adultery, must be tried by a jury, unless a jury trial be waived as provided in section 266, or a reference be ordered as provided in sections 270 and 271.

At any time after issue, and at least ten days before the court, either party may give notice of trial. The party giving the notice shall furnish the clerk at least four days before the court with a note of the issue containing the title of the action, the names of the attorneys and the time when the last pleading was served; and the clerk shall thereupon enter the cause upon the calendar, according to the date of the issue.

Livingston v. Delafield.

LIVINGSTON *against* DELAFIELD.

After stipulation, the court will, on special circumstances, allow a second excuse, and not grant judgment as in case of non-suit.

THIS cause had been put off on the usual affidavit of absence of a witness, in expectation of whose return the plaintiff had stipulated to try peremptorily. On his not doing so, the defendant had, on a former day, moved for judgment as in case of nonsuit, for not proceeding to trial; but not succeeding, and the cause not having been brought on according to the second stipulation, the motion was now repeated.

On the part of the plaintiff, an affidavit was read, [*7] stating that the witness *was a seafaring man, and had never been within the state of New-York since the suit commenced, and that the stipulation to try was in expectation of his return.

Per Curiam. The witness having been constantly out of the state ever since the suit was commenced, and being a seafaring man, some indulgence is due from his way of life. The defendant, therefore, can take nothing by his motion.(a)

Motion denied.

(a) A second stipulation is always allowed, if the motion for judgment, as in case of nonsuit, for failing to try according to the first stipulation, be not made in the term next after the default. *Haskins v. Sebor*, Caines' Prac. 514. Or if the defendant be the cause of not trying. *Coles v. Thompson*, 2 Caines, 47. When witnesses are absent, and their return not immediately expected, a peremptory stipulation is not exacted. *Gardner v. Moses*, 1 Taun. 112. See also *Furnham v. M'Clure*, 7 Wend. Rep. 483; *Jackson v. Wakeman*, 3 Cowen Rep. 578; *Nixon v. Hallet*, 2 Johnson's Cases, 212; *Haskins v. Sebor*, 2 Johnson's Cases, 217.

Bedle v. Willett.

BEDLE et Ux. against WILLETT.

Notice to refer a cause must contain the referees' names. See the act, 1 Rev. Laws of N. Y., 347, 348.

THE COURT said, that notice of a motion to refer must contain the names of the referees. They are never nominated by the court. But the making the motion is not confined to the first day of term; notice may be given afterwards, on showing a reasonable cause for the omission.[1]

SEAMAN against DAVENPORT and others, Tenants in Possession.

In partition, rule to appear and plead are not of course, but must be moved for.

IN *partition*, after service of the petition and notice.

Hopkins moved for a rule to appear and answer.

The Court at first thought this a rule of course; but on the counsel's observing that proof of service was by the act required to be made to the satisfaction of the court, and that the manner of the service would, according to the act, vary in particular cases, the court seemed to coincide, but said that the rule must be drawn up as the party should be advised.[2]

Motion granted.

[1] The New York Code of Procedure (sec. 273) provides: In all cases of reference, the parties, except when an infant may be a party, may agree upon a suitable person, or persons, not exceeding three, and the reference shall be ordered accordingly; and, if the parties do not agree, the court shall appoint one or more referees, not exceeding three, who shall be free from exception.

[2] The New York Code of Procedure (secs. 69 and 448) provides: The

Church v. The United Insurance Company.

CHURCH *against* THE UNITED INSURANCE COMPANY.

Misprision of clerk in drawing up a rule amended on application, and the plaintiff noticing to the adverse party the error, may have the same benefit as if the rule had been right.

THE plaintiff had obtained, in last January term, an order of court for the verdict recovered in this cause to stand, and judgment to be given accordingly, unless the defendant should, fourteen days before the next "*sittings*" in New York, give notice to the plaintiff that a ~~commission~~ *issued* in the suit had been returned, ~~in which~~ case there should be a new trial, and the plaintiff at liberty to amend, &c.

The clerk(a) had drawn up the rule before the next [*8] - "*circuit*." The plaintiff had given *immediate notice of the mistake to the defendant's attorney, and that he should be prepared to try the cause at the sittings. The defendant not having noticed the return of the commission,

Hamilton moved that the rule be amended to "*sittings*," and he made absolute for judgment.

Motion granted.

distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.

The provisions of the Revised Statutes relating to the partition of lands, tenements and hereditaments, held or possessed by joint tenants or tenants in common, shall apply to actions for such partition brought under this act, so far as the same can be so applied to the substance and subject-matter of the action, without regard to its form.

(a) See *post*, *Seaman v. Drake*, 9.

Everitt v. The People.

JAMES EVERITT, Surrogate of Orange County, *ads.* THE
PEOPLE OF THE STATE OF NEW YORK, *ex relat.* CHARLES
BEACH.

Peremptory mandamus set aside on motion, if unfairly issued.

A RULE was obtained in July term, 1802, that the defendant show cause, by October term, why a *mandamus* should not issue, compelling him to proceed in a cause then depending before him, concerning the will of Thomas Beach.

A return was made to this rule, which, from the defendant's counsel being unavoidably detained on his way to Albany, was not filed until the third day of October term.

On the first day of October term, the relator attended, and obtained a rule for the *mandamus*: and on the third day, on filing the return, that rule was vacated.

Notice of the *vacatur* was given to the person who had acted in his behalf, and had obtained the first rule; but the relator had previously left Albany, and the *mandamus* issued.

At the last term counsel was employed to move to set this *mandamus* aside; on his way to Albany, he met the attorney for Beach, when it was agreed that all further proceedings should be stayed until the present term. No further attention was paid to the cause.

The relator attended at Albany the close of the term, employed other counsel, and obtained a rule for a *peremptory mandamus*, which was issued.

Hoffman, on the above facts, moved to enter a *vacatur* on the rule for the *peremptory mandamus*, and to set aside the *mandamus* itself, which was

Ordered accordingly.

 Seaman v. Drake.

[*9] *SEAMAN and others *against* DRAKE.

If the principal be discharged under the insolvent law or bankrupt act, and his bail afterwards be fixed, they may, notwithstanding, have an *exoneretur* entered on payment of costs.

A MOTION had been made last term, on the part of the defendant's bail, to vacate the judgment and all subsequent proceedings. The facts of the case were these :

In April term, 1800, final judgment had been regularly entered, and a *capias ad satisfaciendum* against the body had issued. In July term following the writ was returned *cepi corpus in custodiam* ; on which the defendant applied to set aside the judgment and execution on an affidavit of merits, and that his attorney, who resided two hundred miles back, did not know of the alteration in the rules of practice, by which the defendant was to plead in twenty days, and not as before, in the next term. A rule *nisi*, for setting aside the judgment on payment of costs, and stipulating to plead in twenty days.

No plea being given, in October term, 1801, judgment was confirmed, the roll carried in, costs taxed, judgment docketed, and the roll marked as filed, but the clerk had omitted to sign it. A *capias ad satisfaciendam* was issued, directed to the sheriff of New-York, and returned not found. In January term, 1802, another *capias*, but not a *testatum*, was directed to the sheriff of Ulster, on which nothing was done. In April term, 1802, a *capias ad respondendum* was issued against the bail on their recognizance. In July term, 1802, an *alias*. In September, 1802, a *pluries*. In October term, 1802, an *alias pluries*, which, in January term, 1803, was returned taken. The application of last term was then made on three grounds : first, that the proceedings were irregular, the roll not having been signed by the clerk, pursuant to the law of the 24th March, 1801, c. 75, s. 7.

Secondly, that there was no *testatum capias* issued to the sheriff of Ulster.

Seaman v. Drake.

Thirdly, that the principal had been discharged under the insolvent law.

The Court then said, on the first point, we consider the omission of the clerk's signature as an error of our officer. (a) This ought not to prejudice the plaintiff, defendant, or any other person. The judgment was docketed as the statute requires, (b) and therefore, the world has the due and legal notice of its existence. On these principles, we, the last term, ordered an amendment *nunc pro tunc*, and the same must be done now, by ordering the signature of the clerk to be added in the same manner. On the [*10] other two points we will, as the counsel request it, hear them at a future day.

Hopkins now moved for leave to enter an *exoneretur* on the bail piece, and produced the discharge of the principal under the insolvent law of the state. By this it appeared that the defendant's estate had been assigned by order of the court of common pleas of the county, on the 25th of September, 1801, and the defendant discharged the same day.

Colden, contra. The bail are too late in their application for relief. Process against the bail was returned *cepi corpus* on the first day of January term last. They were, therefore, in eight days after absolutely fixed.

Per Curiam. On Friday, in the second week of the last term, a motion was made to set aside the *ca. sa.* issued in this cause, on two grounds: 1. Because it ought to have been a *testatum* writ, it having issued into a county different from that in which the *venue* was laid; 2. Because the roll was not signed by the clerk, (c) and the record was, therefore, incomplete, and the judgment irregular.

The second objection we considered as a mere clerical omission, and it was disposed of at once, by permitting the clerk to add his signature to the roll *nunc pro tunc*. The

(a) *Snydam v. M. Coon*, Col. Cas. 59. (b) 31st March, 1801, c. 105, s. 2.

(c) *Scotfield v. Un v. Lettie*, 2 Johns. Cas. 75.

 Seaman v. Drake.

consideration of the first objection, on account of the pressure of business, was postponed till the present term; and it being evident that the object of the motion was the relief of the bail, the proceedings against them were in the mean time directed to stay.

Another motion is now made for a rule that an *exoneretur* be entered on the bail piece, founded on the irregularity of the *ca. sa.* as above stated, and also on the further fact that the principal was insolvent, and was discharged under the insolvent act on the 25th September, 1801. The *ca. sa.* was returned *non est* in July term last, and the action against the bail is still pending.

It is now objected, that the bail ought not to be permitted to avail themselves of the defendant's discharge, because it was not a ground on which the motion depended at the last term. But this cannot be a good reason to charge the bail, if they are otherwise entitled to relief.

In the case of *Van Alstyne* ad. *Brinkerhoff*, (a) we [*11] permitted *an *exoneretur* to be entered on an application from bail, under similar circumstances. In that case the principal was also discharged under the insolvent act, before the bail were fixed in law. The suit, however, proceeded against the bail, and the eight days after the return of the *capias* against them had expired before they made their application for relief. We decided, that as they were entitled to have the *exoneretur* (b) entered by

(a) July term, 1802.

(b) The engagement of bail being alternative either to pay the debt or surrender the principal, though in strictness they be confined, for the latter, to eight days in term after the return of the writ against them, (*Strong v. Barber*, 1 Johns. Cases, 329 *Elliot v. Huy*, Ibid. 334,) yet, as it will be allowed at any time pending the suit, and this though they be indemnified, (*Brownlow v. Forbes*, 2 Johns. Rep. 101.) they will have the benefit of a surrender by an *exoneretur* wherever the law has rendered the surrender impossible, (*Wood v. Mitchell*, 6 D. & E. 247. *Merrick v. Vaucher*, Ibid. 50. *Cuthcart v. Cannon*, Col. Cas. 60,) unless they be indemnified. (*Coles v. De Hayne*, 6 D. & E. 246.) An *exoneretur* will also be ordered, when the principal is discharged from the debt, either by having been taken on a *ca. sa.* and liberated, (*Milner and others v. Green*, 2 Johns. Cases, 283,) or by course of law

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fore they were fixed, and had barely omitted to have it done, they had not forfeited that right while the action was pending against them, and that the only consequence was that they subjected themselves to the payment of costs.(a)

The facts in this case in support of the motion made this term are similar, and we think the former decision was equitable and proper in favor of bail, and ought to govern the present.[1] It is, therefore, unnecessary to give an opinion on the first objection made on the former motion.

Let the *exoneretur* be entered on the payment of costs.(b)

(*Kane v. Ingraham*, Ibid. 403,) and this to prevent circuitry. The power which bail have to relieve themselves by a surrender, is preserved to both, when sued jointly, so long as it remains in either; and each will be entitled to avail himself of it, for their mutual benefit; (*Ballard and Pariman v. Kibbe and Ludlow*, Col. Cas. 51,) nor does the principal's being in custody as a felon prejudice their right. (*Bignell v. Forest*, 4 Johns. Rep. 482.) But by the death of the principal it is lost. (*Olcott v. Lilly*, 4 Johns. Rep. 407.)

(a) Those of the suit against themselves.

(b) In the course of the argument a case of *Riddles v. Mitchell*, *manuscriptor of Ogley*, was alluded to. From the relation of the counsel in that cause, the facts were as follows:

RIDDLES v. MITCHELL.

THE original action was brought in the mayor's court of the city of New-York, and judgment obtained therein. The defendant brought a writ of error returnable to this court. Pending the writ of error, the defendant in the original suit was discharged under the insolvent law. Errors not being duly assigned, the defendant *nonprossed* the writ, issued *a ca. sa.* in this court, and upon a return of a *non est inventus*, brought an action of debt against the bail on their recognizance in the original suit. After declaration, plea, and demurrer, the defendant applied to the court to stay proceedings. It was contended, on the part of the present plaintiff, that the defendant came too late with this application, having pleaded to the action. But the court, on the authority of a case in Carthew,* ordered the proceedings to be stayed.

[1] As to relief of bail after discharge of principal, see also, *Campbell v. Palmer*, 6 Cow. 596. *Cunningham v. Brown*, 5 Id. 289. *Franklin v. Thurber*, 1 Id. 427. *Mechanics' Bank v. Hanard*, 9 Johns. Rep. 392. *Post v. Riley*, 18 John. 54. *Trumbull v. Haley*, 21 Wend. 670. *White v. Blake*, 22 Id. 612. *Russell v. Champion*, 2 Wend. 462. See Hogan's N. Y. Digest, tit. Bail.

* *Dodson v. King*, 515. But the case seems by no means analogous. A surrender had been *actually* made before the return of the *habeas* on which the bail had been arrested.

Hallet v. Cotton.

HALLET against COTTON.

On moving for a new trial, the court will not order the amount of the verdict, or sum admitted due, to be brought in, though the bail have become insolvent, and obtained their certificates under the bankrupt law.

THIS cause was tried at the sittings after January term last, when the jury found a verdict for the plaintiff for 866 dollars and 20 cents. The defendant obtained an order for a stay of further proceedings until the next term, for the purpose of then moving for a new trial.

Hawes now moved, on the part of the plaintiff, for an order, that the defendant bring into court the sum found by the jury, with costs of suit; and that in default [*12] thereof, the order *to stay proceedings be discharged.

In support of the application he read an affidavit stating, "that since this cause has been at issue, the special bail has been declared bankrupt, and discharged under the bankrupt law of the United States. That, on the trial of this cause, a balance was admitted by the defendant's counsel to be due to the plaintiff of about 500 dollars. That, at the sittings in November last, on the application of the defendant, this cause was put off for that court, on the condition of payment of costs; but that those costs, although repeatedly demanded, were not yet paid." A further affirmation of the plaintiff was read, stating "that from the circumstances of the defendant he was in danger of losing his said debt, unless the money was brought into court, or the rule to stay proceedings discharged." A copy of this affidavit, it was acknowledged, had not been served.

He argued that a motion for a new trial was an application to the equitable discretion of the court, to relieve from what, in the opinion of the party, was an erroneous or oppressive verdict. That it was a maxim of law, founded on

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principles of equal justice, "that he who seeks equity should do equity." From the affidavit it appeared, that the defendant had admitted on the trial that the plaintiff was entitled to recover about 500 dollars, which sum entitled him also to full costs. Before, therefore, the court would suffer the defendant to be heard on a motion for a new trial, they would require him to do what he acknowledged to be just. The bankruptcy, and discharge of the bail, and the circumstances of the defendant, were additional reasons for requiring the defendant to bring the money into court, to abide the event of the suit. That, from the great number of cases now before the court, it was not in the least probable that the case to be made in this cause could come on in its order, and a decision be had thereon, in a shorter time than six or nine months; before which period the defendant, from his present circumstances, would doubtless be a bankrupt, or, as his bail were already bankrupt, he might abscond. Under such circumstances, *delay* was equally prejudicial as a *denial of justice*. It also appeared that the defendant was now in contempt, and liable to an attachment for non-payment of costs incurred on putting off the trial of this cause, at a former sitting. That it was a standing rule of the mayor's court of the city of New-York, *that [*13] "upon every motion for a new trial, the defendant should, within eight days, bring into court the sum recovered by the verdict, with costs; and that in default thereof, the plaintiff have leave to proceed." That, although this court might not be disposed to go the length of establishing such a rule in *all cases*, it was believed the peculiar circumstances of this cause were of a nature that would induce them not to hesitate in making the order now requested; or at least, for such sum as was admitted to be due, with costs.

"*Bogert* said the object of the motion was perfectly new and unprecedented.

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Per Curiam. The practice of the mayor's court, in obliging the amount of the verdict(a) to be brought into court on a motion for a new trial, has never been adopted here. The insolvency of the bail(b) is certainly not a sufficient ground to induce us to make such an order; and a copy of the affirmation, respecting the defendant's circumstances, has never been served on him; of that, therefore, we can take no notice.(c) But let it be understood, we do not mean to say that had it been otherwise we would have granted the motion.(d)[1]

Rule refused.

(a) But on a tender of it with costs up to the time, entry of judgment, and all further proceedings will be stayed. *Hatfield v. Brown*, 1 Johns. Rep. 506.

(b) See *Gillespie* ads. *Pfister & M'Comb*, as to insolvency in cases of security for costs. Col. Cas. 119.

(c) *Card* ads. *Fitzroy and others*, Col. Cas. 63, whenever a special motion is to be made on the affidavit, a copy must be served. See also *Grove v. Campbell*, Ib. 114, that supplementary affidavits to rebut those in answer cannot be received. See *post*, 173, *Deas v. Smith*, note there.

(d) See *Bird, Savage & Bird v. Pierpont*, 3 Caines, 106.

[1] The New York Code of Procedure (secs. 264, 265) provides: Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment to be rendered thereon, or an order that the cause be reserved for argument or further consideration. The justice trying the cause may, in his discretion, and upon such terms as may be just, stay the entry of judgment and further proceedings, until the hearing and final decision of a motion for new trial, or to set aside the verdict or judgment, upon the grounds of surprise or irregularity, or upon a case or bill of exceptions.

The court shall have power to order a verdict to be entered, subject to the opinion of the court thereon. The judge who tries the cause may, in his discretion, entertain a motion to be made on his minutes to set aside a verdict and grant a new trial upon exceptions, or as being against evidence, or for insufficient evidence, or for excessive damages; but such motions in actions hereafter tried, shall only be heard upon the minutes at the same term or circuit at which the trial is had, and if not heard at the same term or circuit in actions hereafter tried, the motion must be made upon a case or bill of exceptions, or upon appeal. When such motion is heard and decided upon the minutes of the judge, an appeal may be taken from such decision, and in case of appeal, a case or bill of exceptions must be prepared and settled in

 Gilbert v. Brazier.—Vandyck v. Van Beuren.

GILBERT *against* BRAZIER.

Party on whom a fine is levied, not liable to the costs of levy.

A QUESTION was made in this cause whether the sheriff is entitled to fees on levying a fine?

Per Curiam. The statute directing the mode of making the levy, declares it shall be done without fee or reward. The fee bill gives a fee, but does not say by whom it shall be paid. We all know how it has been; the fee has been charged by the sheriff in his accounts. This, we think, is the regular practice; for it cannot be demanded from the person who has been obliged to pay the fine.

 VANDYCK *against* VAN BEUREN and VOSBURG.

Liberty to turn a case into a special verdict stays execution.

PER CURIAM. Wherever a case is made, with liberty to turn it into a special verdict, execution must stay, of course, till the next term after the decision is given: that if

the usual form, and upon which case or bill of exceptions the argument of the appeal must be had.

After the trial of a cause, either party may, in the manner prescribed by law and the rules of the court in which the action is pending, make and settle a case or bill of exceptions, which when settled shall be filed, and when filed after judgment, shall be attached to and become a part of the judgment roll.

Motions for a new trial on a case or bill of exceptions, motions for judgment on a special verdict or case reserved subject to the opinion of the court, shall in the first instance be heard and decided at a special term, unless the justice trying the cause shall direct it to be heard in the first instance at a general term. If such order is granted, directing it to be heard at a general term, such motion may then be noticed and brought on to argument by either party at a general term of such court, and the court shall hear and decide the same.

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either party be dissatisfied, there may be time to make up the special verdict.(a)[1]

[*14]

*HEYL *against* BURLING.

A mate of a vessel having a right to a certain quantity out of a cargo, by way of privilege, cannot, after a sale of the whole cargo by the consignee, pick out any specific parts, and sell them. A right of privilege in a cargo does not give such an interest as will enable the purchaser of it to maintain trover, if the consignee has not assented to the selection of those parts which are taken in satisfaction; for, in trover, property and possession must be shown. A release, executed to a witness, after his having deposed, does not make him competent.

TROVER to recover the value of two logs of mahogany, part of a cargo consigned to one Isaac Roget. The cause was tried at the New-York sittings, in June, 1802, before Mr. Justice *Radcliff*, when a verdict was found for the defendant.

Several exceptions having been taken at the trial, a case was made from whence it appeared that the plaintiff had adduced in his behalf, one Mackworth, who testified to the purchase of the logs by the plaintiff, for 100 dollars, from Bonsall, the mate of the vessel in which the cargo was shipped.

Charles Smith, a further witness on the part of the plaintiff, stated that he was at the purchase, which took place on a Saturday. That the logs were pointed out, agreed for, and immediately marked by the plaintiff, in the presence of the captain of the vessel, before whom and the mate, the plaintiff, on the Monday following, took posses-

(a) If there be a special verdict, and a case made also, the party must elect on which to proceed, as he will not be permitted to argue on both. *Sleight v. Rhineland*, 1 Johns. Rep. 192.

[1] See Rule 20 of New York Supreme Court, and New York Code of Procedure, sec. 264.

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sion of them, and afterwards removed them to a saw yard. That he, the witness, took them from the yard, and left them for Heyl at Whitehall. That the captain, at the time of the removal of the logs, sent a person to see that they were those which had been sold, and had the proper marks. This person examined the logs and took their numbers. That on the logs being afterwards missed, he, the witness, went, in company with the plaintiff, to the defendant's yard, where he saw them. That the plaintiff immediately claimed them as his, and demanded them of the defendant, who refused to deliver them up. That Roget, while the logs were on the wharf, consented to the plaintiff's taking them away, and made no objections to the sale of the mate.

The witness mentioned that when he was first examined, he had said that the plaintiff had agreed for the logs at the rate of one shilling and sixpence per foot, in explanation of which he stated, that, as the logs were not then measured, the price was subsequently changed by the plaintiff and mate into a gross sum of 100 dollars, in order to get rid of the trouble of admeasurement.

The plaintiff here rested his case.

The defendant called Jeremiah Marshall, a public measurer of timber, who stated *that he was employed by Roget to measure a cargo of mahogany [15] consigned to him, as he the witness, understood from Roget, the captain, and mate of the vessel; that, after the first day's work was done, the mate pointed out a log of mahogany, part of the cargo, (and which had been measured, marked, and numbered No. 21,) as being one of three logs, which belonged to him; that the witness, on the next day, before they began to discharge any of the mahogany, requested the mate to mention when they came to the other logs which belonged to him, in order that they might be put into a different bill; upon which the mate said, that he did not own any three particular logs, but that he had a right to make choice of three; that the witness might

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measure the whole together, as he had been directed, and that he, the mate, would settle with Roget for the interest he had therein. In consequence of this, the account of the measurement of all the mahogany was kept in one bill, and delivered to Roget, who paid for it.

After Marshall had given his testimony, Smith said, that the logs bought by the plaintiff had, at the time of purchase, been measured, as he saw the measurer's marks upon them.

The defendant then offered Roget, who was objected to by the plaintiff's counsel, as incompetent; but on being released by the defendant, was admitted, the point of his admissibility being saved.

Roget's testimony was, that he never authorized the mate to sell any of the cargo. That the whole consignment was sold by him to the defendant, before the taking away of the logs. That he never gave any authority to the plaintiff to take away the mahogany, nor ever had any knowledge of the claim of the mate to any three particular logs, until after the defendant had purchased the whole cargo, and until after the plaintiff had taken from the cargo which lay all together upon the wharf, the three logs he had purchased.

The plaintiff's counsel then offered to prove declarations and admissions of the captain, as well before as after the sale of the mahogany by the mate to the plaintiff, [*16] that such sale was by *his, the captain's, knowledge and consent; insisting he stood in the relation of agent for the consignee; but the testimony was rejected. This point also, at the request of the plaintiff's counsel, saved by the judge.

The defendant then read a deposition of a clerk in the counting-house of Roget, stating that he was on the wharf at the foot of Rector-street, when the plaintiff and several other persons were removing three logs of mahogany, No. 21, 50, and 52, which the witness forbade, informing them Roget had sold the logs to the defendant; that the witness

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knew the whole cargo, comprising the three logs above mentioned, were consigned to Roget, who had accounted for the same to the consignor; and that the whole were sold to, and paid for by, the defendant.

Against these facts, the plaintiff, to prove his interest in the logs, and Roget's consent to the sale, offered a deposition made by the mate, and duly taken. This was insisted upon as proper testimony, there being no evidence that the mate had warranted the logs to the plaintiff, as his property: but the judge deeming it inadmissible, unless the mate was released, the plaintiff produced a release. The witness to its execution being called upon to prove it, testified, that he was present at the time the deposition was taken, and on his return to his office, being an attorney, and acting in behalf of the attorney for the plaintiff, fearful lest an objection might be taken to the interest of the witness, he drew a release, and the same was executed by the plaintiff, and delivered to the mate in his office, who left it with the witness, for the purpose of being used on the trial. That this was done in the course of half an hour after the deposition was taken; and before the plaintiff, witness and mate had separated, after they had left the place of examination. That the defendant's attorney cross-examined the mate, and such cross-examination was in writing, at the end of the mate's testimony, as proven on the part of the plaintiff; and a consent was subscribed to such examination by the defendant's attorney, as follows:

"We, the subscribers, attorneys for the plaintiff and defendant respectively, do consent that the above deposition be *read in evidence upon the trial of this [*17] cause; saving and reserving the exception to the admissibility of the testimony."

Under these circumstances, the deposition was again offered, but rejected, reserving the point.

The judge charged, that it was absolutely necessary the plaintiff should show an acquiescence on the part of Roget to the sale by the mate; and that the consent of the cap-

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tain, or his acts, and those of the mate, were not binding without such acquiescence.

Woods, for the plaintiff, now moved to set aside the verdict for misdirection, as well as for the rejection of proper testimony, and for a new trial.

A release to Bonsall, the mate and vendor of the plaintiff, was, he argued, totally unnecessary; the court ought not to have asked it, as he was competent, being equally liable, (a) howsoever the cause was determined; first, to Roget, the consignee, and also to the plaintiff, as purchaser. *Peake's Law of Ev.* 113. (b) And peculiarly so, as Bonsall had sold without any warranty; and, therefore, had never asserted any interest in himself. (c) *Peake*, 118. "If a vendor of an estate covenant for the title, or warrant the premises, he cannot be a witness to support the title of the vendee, in an action against him, by a third person, for the premises. 2 Roll. Abr. 685, pl. 1. But a vendor, who does not covenant for the title, or enter into any warranty, is a good witness. *Busby v. Greenslate*, 1 Stra. 445." (d) But if the court should be of opinion a release was necessary, such a release was given and offered. The circumstance of its being after the examination, is immaterial, from the peculiar facts stated in the case. If Roget, the consignee, was competent, being

(a) *Milhoard v. Hallett*, 2 Caines, 77, S. P.

(b) It is supposed *Evans v. Williams* is the case alluded to, (7 D. & E. 481, n. c.)

(c) The old cases make a distinction between sales of chattels in possession and out of possession. That in the first instance, an express warranty is not necessary; in the second, it is. *Medina v. Stoughton*, 1 Salk. 210. But this has been denied to be law. *Pasley v. Freeman*, 3 D. & E. 57, 58. See 1 Lex. Mer. Am. 372.

(d) The reason of these determinations is, that, with respect to purchases of lands, the maxim of "*caveat emptor*" applies; in those of chattel interests, it does not. Money had and received will not lie to recover back the consideration paid for an assignment of a mortgage, which turns out to be a forgery, if *bona fide* transferred, and the assignor has not covenanted for the goodness of the title. *Bree v. Holbeck*, Doug. 355. But see 2 Ch. Cas. 9 and *Hurdingle v. Nethorpe*, Nels. Ch. Rep. 118.

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released by the defendant, Bonsall, the vendor, was as much so, on a release from the plaintiff. Besides, the declarations and admissions of the captain were full evidence for the plaintiff. He was the agent of the consignor; and, as in that capacity he consented to the sale to the plaintiff, it bound Roget, and confirmed the sale by Bonsall; the *rejecting, therefore, these declarations and ad- [*18] missions, was contrary to law. From the facts, it appears the plaintiff had peaceable possession under a good title; and, at all events, his possession alone was enough to prevent the defendant from taking the logs out of that possession; for it was as much continued while the logs lay at Whitehall, as if in the plaintiff's yard; having been left there by him.

Boyd, for the defendant. There is not an equal liability in Bonsall. He is not liable to the defendant; for there is no privity between them. The defendant purchased of Roget, and Roget is liable to him, not the mate;(a) for he is liable only to the purchaser, the plaintiff; and, therefore, liable to only one of the parties in the cause. Therefore, admitting the principle of equal liability, it does not apply; as to the release being given after the deposition offered, the testimony was properly rejected. The reason why a release is necessary, is to do away the effect of the influence of interest; but, if it be given after the testimony, the interest has already had its effect. The declarations and admissions of the captain could not be received; for he is not the agent of the consignee, and his agency for the consignor terminates on delivery; which had here taken place, and a sale been made to the defendant. He denied, therefore, the possession of the plaintiff; as it had been transferred, by the consignee, to Burling; and as to the warranty, in sales of chattels, it was not necessary.

(a) The principle is, that the liability must be immediate to the parties in the suit, and not a remote, circuitous liability. *Ball v. Bestwick*, 1 Stra 575

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RADCLIFF, J. I understood the mate's claim to be founded on his office, as a privilege annexed.

Woods, in reply, insisted on his first positions.

Per Curiam. The facts of this case arise merely from the depositions of witnesses. From these it appears that the plaintiff purchased of one Bonsall, the mate of a vessel, three logs of mahogany; that, at this time, the captain and consignee were present, as is stated by the witnesses of the plaintiff. On the case, as presented to us, there is some degree of contradiction in the testimony, which, as it was laid before the jury, they, no doubt, duly estimated. In this action, property and possession must be shown.^(a)[1] The only evidence of this property and possession is from the testimony of Mackworth and Smith. They state, that the price contracted for, between Bonsall and the plaintiff, was one hundred dollars; and Smith, as a reason for a [*19] gross sum being *agreed upon, adds, "that it was to save the trouble of having the mahogany measured." Marshall, the public measurer, deposes, that he did

(a) To maintain the action of trover, there must be a right of possession and a right of property. The right to the possession must be immediate, (*Gordon v. Harper*, 2 Esp. Rep. 465,) that is, the plaintiff must be entitled to the possession of the goods at the time of the action brought; but, it is not necessary that actual possession should ever have been enjoyed; a possession in law is sufficient. *Hudson v. Hudson*, Latch, 214. *Flewelling v. Rave*, 1 Bulst. 68. The right of property may be absolute, *Pyme v. Dor*, 1 D. & E. 65; *Blaker v. Anscombe*, 1 N. R. 25,) or special, as that of a bailee, (*Arnold v. Jefferson*, 1 Ld. Raym. 275,) or a carrier, (*Goodwin v. Richardson*, 1 Roll. Abr. 4,) or a sheriff, (*Wilbraham v. Snow*, 2 Saund. 47,) but the right of property and possession must unite in the plaintiff. *Gordon v. Harper*, *ud. sup.* See also *Webb v. Fox*, 7 D. & E. 391. In addition to these requisites in the plaintiff, the subject matter of the suit must be a personality. *Ehues v. Shaw*, 3 East, 51. *Quere*, whether, in regard to the subject, *Todd v. Crookshanks*, 3 Johns. Rep. 432, be reconcilable with *Goggerley v. Cuthbert*, N. R. 170. Observe, that possession alone gives a right of property against wrongdoers, and all the world except the right owner. *Armory v. Delamirie*, 1 Stra. 505. *Webb v. Fox*, *ud. sup.*

[1] See also *McDonald v. Hewitt*, 15 J. R. 349.

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measure the whole cargo, and that the mate sold them, after they were so measured. That, at the mate's request, the charge of measuring was debited to Roget, the consignee, who paid for it; and that the mate himself acknowledged he did not own any three particular logs, but that he had a right to make choice of three, and would settle for it with Roget. After this testimony is delivered, Smith recollects that the mahogany had been measured, and that he saw the measurer's marks on the logs; though, before that, he assigns its non-measurement as a specific reason for a gross price of one hundred dollars being agreed as the purchase-money. After this, a release being produced from Burling, the defendant, Roget, the consignee, was admitted very properly as a witness, and he is followed by his clerk. Under these circumstances, it must be taken for granted that the jury weighed Smith's credibility; and if so, there could be no doubt that there was neither property nor possession in the plaintiff. It is urged as a reason for a new trial, that the judge's charge precluded certain testimony; or, at least, prevented the jury from weighing it; for, the judge charged that it was necessary to show an acquiescence in Roget. But it must be presumed to have been understood by the jury, that Roget's acquiescence was necessary for Heyl to show property in himself; and, on this point, we think that the mate, Bonsall, must have shown property, as the consignment was to Roget entirely. The testimony of Smith was very properly disregarded, and the verdict ought to stand. The release of Bonsall, being after his examination, and when the interest he had must have had its full influence and operation on his testimony, came too late, and could not be received.(a)

New trial refused.

(a) A release to render a witness competent must destroy, in regard to the object of controversy, his liability to both parties, and that, as well in equity as at law. *Cheyne v. Koops*, 4 Esp. Rep. 112. See *Herrnance v. Verney*, 6 Johns. Rep. 5, as to competence of vendors.

 Jackson v. Cooper.

JACKSON, on the demise of JAUNCEY, *against* COOPER and STYLES.

In ejectment against several defendants, though they sever in their pleadings, and enter into separate consent rules, the notices and pleadings must be entitled against all, as at the commencement, but each party must be served with a separate notice, &c.

THIS was an action of ejectment, in which the defendants severed in their appearances, entered into separate consent rules, and pleaded separately.

The plaintiff had, in a former term, obtained leave to amend, by altering the name of the lessor of the [*20] plaintiff from John to *William Jauncey; but the notices on which the motion was founded, were entitled as above, against both defendants.

Benson now moved to set aside the proceedings for irregularity, contending that, as the defendants had severed, the original suit became divided into two distinct causes. That, therefore, there should have been two separate notices, each entitled against one defendant, and served on the different attorneys of the defendants. For there was not then any suit, in existence, such as that in which the notices purported to be given.

Hopkins, contra, insisted the notice was perfectly regular, and likened it to the case of a suit against two, where one is outlawed, yet the proceedings are entitled against both.(a)

Per Curiam. The objection taken against the notices and rules is, that, as the defendants appeared by distinct attorneys, and entered into separate consent rules, these cir-

(a) So where one of several defendants is proceeded against under the statute, (1 Rev. Laws, 353, 513,) the papers are entitled against all. *Dando v. Fremper*, 2 Johns. Rep. 87.

 Bell v Rhinelander.

cumstances required separate and distinct proceedings, and ought to have been entered and entitled as separate; that is, that the notices should have been separate, addressed to each party, and the rules entered accordingly. The notice given to Van Schaick, attorney for Cooper, is entitled against two; and it is on that notice the application is made. The court are of opinion that this is the regular way in which the notice should be entitled, though each party should be served. It does not follow, that appearing separately, and entering into separate consent rules, justifies or requires a different practice; for pleading separately does not make separate suits.^(a) The notice must be as the case was originally entitled, and a copy served on all the attorneys; for otherwise it would imply a distinct issue in each suit.

Motion refused, with costs to the plaintiff

 BELL and others *against* RHINELANDER.

Practice on moving for partition.

IN partition, only the notice and affidavit of service is read, not the petition.

(a) Therefore, in such a case, only one *venire* issues, which is, "therefore, as well to try this issue as the said other issue (or issues) above joined, between the said, A. B. and the said C. D.," (or "and between the said A. B. and E. F.") "let a jury, &c.

Jackson v. Reynolds.

JACKSON, *ex dem.* NICHOLAS LOW and others, *against*
JAMES REYNOLDS.

If the plaintiff in ejectment count upon demises by persons who are dead, the defendant, after entering into the consent rule, may apply to have their names struck out of the declaration, and that without costs, the necessity of the application arising from the plaintiff.

ON an affidavit stating the death of one of the lessors of *the plaintiff, from belief, information, diligent search, and inquiry,

Riggs, on the behalf of the defendant, moved to strike out of the declaration one count wholly, (a) and in all others the name of Drake, with costs.

Howell, contra. The application now comes too late, being after entering into the consent rule: (b) at all events, the affidavit should state that the fact was unknown at that time. In addition to this he mentioned, that from the counter affidavit which he held, it appeared the defendant had heretofore consented to give up possession, having failed to try according to stipulation.

Per Curiam. The motion must be granted. It has been before decided, that a defendant may thus come in and

(a) The practice as to amendments, where, on the defendant's application, a demise is struck out, has been settled in a recent case to be as follows: The defendant must serve a certified copy of the rule to amend on the plaintiff, which is to be deemed an actual amendment, as to all subsequent proceedings on the part of the plaintiff; and the defendant without a new copy of the declaration, must enter into the consent rule, and plead within twenty days after the service of the certified copy of the rule for the amendment, unless otherwise ordered by the court; and the rule is sufficient to authorize an actual amendment of the declaration, on file, or to file a new one in its stead, whenever it may be necessary. *Jackson, ex dem Kelly and Oakley, v. Belknap*, 7 Johns. Rep. 300.

(b) S. P. *Dissada. Butler and others*, Colo. Cas. 102.

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move, on the death of a party before the commencement of the suit. As to the objection, that the application is out of season, the answer is, that it is never out of season when on the ground of an original irregularity in the plaintiff himself. Therefore, the not coming in earlier cannot be urged.[1] The affidavit of the defendant furnishes such evidence of the facts as is *prima facie* sufficient; and if not true, ought to have been denied by the plaintiff, especially as it is in his power; for the attorney of the lessor may, nay, certainly must, know if his client is alive. As to the costs it does not necessarily follow that the attorney of the plaintiff must know of the death of one of the lessors. He may have examined into the title on behalf of one person, acting for others equally interested, and seeing a number of names necessary to be made parties, he might have thought them all in existence, and the affidavit of the defendant be the first notice of the death of any one entitled. The costs ought to be paid if the fact was known sooner; and the application for the object of this motion ought to be made as soon as the right to apply was discovered; we grant the motion but without costs.

Howell then asked for the costs of amending.

The Court said, they would reserve their determination on that point till the next day, when they denied them saying the plaintiff was irregular from the beginning; and though he might not have been in fault, there is no reason for allowing him costs, when it is to have his proceedings rectified that the defendant comes before the court.

Motion granted without costs to either party.

[1] When a party seeks to set aside proceedings for mere irregularity, he must apply at the first opportunity. *Nichols v. Nichols*, 10 Wend. 560, *Leavitt v. Woods*, 10 Id. 558; *McEvers v. Mackler*, 1 J. C. 248, *Jones v. Dunning*, 2 Id. 74; *Giles v. Quines*, 3 Cal. R. 107; *Anonymous*, 5 Wend. 82. But this rule does not apply to motions for relief affecting the substantial rights of parties. *Doty v. Russell*, 5 Wend. 129.

Sheffield v. Watson.

[*22] *SHEFFIELD *against* WATSON.

A mistake by an attorney, of a rule of practice may prevent judgment as in case of nonsuit for not going to trial, but will not excuse costs.

HOPKINS, for the defendant, moved for judgment as in case of nonsuit for not going to trial.

Woods, contra. The cause was called on, but as there were other causes on the day calendar, one of which actually occupied the court the whole day, the plaintiff's attorney, not being quite ready, thought he should be entitled to bring it on the next day, the day calendar not being gone through; but found he was put down to the bottom of the calendar for the circuit. This, therefore, is a plain mistake of the rules of practice, which ought not to injure the plaintiff.

Hopkins. The plaintiff clearly was not ready; therefore equally in fault, whether the rule was as he imagined, or not.

RADCLIFF, J. Acting under that belief, he did not prepare himself.

Hopkins asked for a stipulation and costs.

Per Curiam. The excuse is certainly not sufficient to exonerate from costs. If admitted in one case, it must be in all; and, however the good faith of the plaintiff's conduct, and our belief of it, may deny the judgment moved for, to refuse costs would do away the effect of the rule. The plaintiff must stipulate.(a)

On stipulation and costs, motion denied.

(a) See *Russell v. Ball*, *post*, 252.

 Fallmer v. Steele.

FALLMER against STEELE and another.

On producing certified copy of original writ, declaration amended.

HOPKINS moved to amend a count in the declaration, in conformity to the original writ, (a certified copy of which he produced,) by striking out the words "town of Herkemer," and inserting the "town of German Flats." [1]

Ordered.

[1] The New York Code of Procedure (secs. 169 to 175) provide: No variance between the allegation in a pleading and the proof, shall be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defence, upon the merits. Whenever it shall be alleged, that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended, upon such terms as shall be just.

Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

Where, however, the allegation of the cause of action or defence to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, within the last two sections, but a failure of proof.

Any pleading may be once amended by the party of course, without costs, and without prejudice to the proceedings already had, at any time before the period for answering it expires, or, it can be so amended at any time within twenty days after the service of the answer or demurrer to such pleading unless it be made to appear to the court that it was done for the purposes of delay and the plaintiff or defendant will thereby lose the benefit of a circuit or term for which the cause is or may be noticed, and if it appear to the court that such amendment was made for such purpose the same may be stricken out and such terms imposed as to the court may seem just. In such case a copy of the amended pleading must be served on the adverse party. After the decision of a demurrer, either at a general or special term, the court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead over upon such terms as may be just. If the demurrer be allowed for the cause mentioned in the fifth sub-division of section one hundred and forty-four, the court may, in its discretion, and upon such terms as may be just, order the action to be

Remsen v. Isaacs.

REMSEN, Administratrix, against ISAAOS.

On a non-enumerated motion for irregularity, merits cannot be entered into but on merits irregularity may be shown.

MULLIGAN moved to set aside a report of referees for irregularity and on merits.

Woods, contra. In *King v. Hughes* it was determined, that if a motion be made as non-enumerated for irregularity, the *ground of merits must be abandoned, though on the merits the irregularity may be insisted on.

Per Curiam. The rule is according to the decision cited. The application must be for irregularity *only* to bring it on

divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned.

The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party or a mistake in any other respect, or by inserting other allegations material to the case, when the amendment does not change substantially the claim or defence by conforming the pleading or proceeding to the facts proved.

The court may likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made or other act to be done after the time limited by this act, or by an order enlarge such time; and may also, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect; and may supply an omission in any proceeding; and whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code, the court may in like manner and upon like terms, permit an amendment of such proceeding, so as to make it conformable thereto.

When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding, by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

HUN v. BOWNE.

as a non-enumerated motion. If merits are united, it becomes enumerated.(a)

Motion denied.

HUN and others *against* BOWNE.

If a case made do not set forth the merits of a cause as they appeared on the trial, and the amendments proposed do not reach the hands of the counsel employed within a time agreed on, and within which they might have arrived but for an accident, the court will grant a further day to amend, and perfect the case.

COLDEN, for the plaintiffs, moved for leave to amend the case made by the defendant.

From the affidavit of the attorney for the plaintiffs, it appeared, that the defendant's attorney had agreed to give the plaintiffs' attorney till the 21st January last, to settle his amendments before a judge at Albany, the cause having been tried in New York; that by some accident the amendments proposed by the plaintiffs to the case made on the part of the defendant, had not come to the hands of the counsel who was employed to attend to the business there, until the 22d January; and further, that the case made by the defendant did not set forth the merits of the cause as they appeared on the trial.

Hoffman, amicus. In *Duff v. Van Zandt*, on a suggestion that the case made did not contain a true statement of facts, the court granted a new trial after argument and decision.

Boyd, contra. The application stated some circumstances of strict and unaccommodating conduct in the plaintiff's attorney, which had occurred previous to the agreement.

(a) *S. P. Foden and Slater v. Sharp*, 4 Johns. Rep. 183.

 Anonymous

mentioned in the affidavit read by *Colden*, and some declarations of the plaintiffs' attorney, that he would hold the defendant to strict practice.

Per Curiam. We cannot travel back farther than the agreement stated. It appears that the defendant had given the plaintiff a time, which from accident he could not keep; the amendments were sent with due speed, and so that they *might* have arrived at Albany in season, if nothing had happened to prevent it. We cannot let the plaintiff suffer by circumstances which he could not control. The verdict is in the hands of the plaintiff, and the defendant cannot be injured by a short delay.(a)

Motion granted.[1].

 [*24]

*ANONYMOUS.

Cases for argument must be noticed.

BY THE COURT. All causes intended for argument must be duly(b) noticed before term to the clerk, that he may enter them on the calendar. If not so noticed, they must go to the foot of the calendar, without regard to the date of their issues.[2]

(a) If the papers from whence the case is to be made be in the plaintiff's hands, the court will order them to be furnished, and stay proceedings in the mean time. *Jackson v. Platt*, 2 Johns. Cas. 71. If an important fact has been omitted, leave will be given to add it. *Jackson v. Barker*, August, 1803, Caines' Prac. 523.

Foot v. Colwin, 2 J. R. 481; *Jackson v. Brownell*, 3 J. R. 140; *Codwin v. Barker*, 1 Cai. R. 74.

(b) Four day notice.

[1] An order for time to make a case cannot be enlarged after it has expired; relief can be had by motion only. *Hawkins v. Dutchess & O. S. Co.*, 7 Cow. 467.

[2] See Code of Procedure, sec. 256, as given *ante*, p. 6; and Rule 37 of Supreme Court.

Halsey v. Watson.

HALSEY *against* J. and S. WATSON.

Court will not grant a new trial, where the evidence has been on both sides. In applications for new trials, on account of a subsequent discovery of material testimony, what that testimony is, must be stated, that the court may judge of its materiality.

THIS was a motion for a new trial, on an affidavit of a discovery of new and material evidence. The points and substance are so fully stated in the decision of the court that it is unnecessary to do more than give the judgment.

Per Curiam. This is a motion for a new trial, and comes before us on the ground of a discovery of material testimony since the trial of the cause. To see this, and judge whether it be material or not, it will be necessary to state the former testimony and nature of the suit.

It is *assumpsit* by Halsey, the plaintiff, against James and Samuel Watson, the defendants, as owners of the ship Chesapeake, founded on a neglect in not taking on board some tobacco, according to contract.

The witness, Heyer, who appears to have acted as agent for the plaintiff, states what the contract was, and the time at which the tobacco was to be on board. This agreement appears to have been made on a Friday. The witness inquired of the defendant James Watson, when the tobacco should be sent down to the vessel. The answer was "Send it down as quick as possible:" in consequence of which, it was sent the very next day.

From three witnesses it is shown, that the principal part of the tobacco was on the dock by *eleven o'clock* in the forenoon, and that the whole was ready to be put on board by *three*. These facts, then are established by three witnesses. The captain swears that, after 4 or 6 hogsheads had been brought, he requested the carmen not to bring any more, as there were appearances of a storm.. This the principal

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carman has, in effect, denied; for he says, he was desired by those on board the ship, or the captain, to bear a hand; and that he got all the tobacco down by dinner [*25] time. Here the *testimony is contradictory. We are to judge, then, if the material evidence, as it is termed, that has been discovered since the trial, be really testimony or materiality. There is one person who swears as to the directions given by the captain. The court are of opinion that this is not material, so as to warrant granting a new trial. This in two points of view: the testimony goes only to impeach the credit of what has been sworn, and not to establish any new fact. It is merely contradicting former evidence. In that point of view it is not material: nor can it be so in another, unless the defendants can go further. The direction not to bring down the tobacco, was to a carman. This is not sufficient: as Watson directed it to be sent as soon as possible. It ought to have been to the owner of the tobacco: or to have shown that the request was brought home to the knowledge of the plaintiff; that it was made to a carman, is not sufficient. The defendants' affidavit states two other witnesses, who are material; but does not say to what facts they would testify; we cannot, therefore, judge whether they are material or not. Blackmer, it is stated, will testify that the tobacco was not marked till Monday. This will only go to impeach the credit of the testimony; for three witnesses swear to the fact of the marking being before one o'clock on Saturday. The captain himself does not pretend that the reason for not taking it on board was the hogsheads' not being marked, but only that he had not time. He does not pretend it was not ready to be taken on board.

New trial refused.(a)

(a) The rule to be extracted from the cases on the subject of new trials, where evidence has been given on both sides, seems to be, that if the verdict be manifestly against the weight of evidence, and will work injustice, a new trial will be granted. *Berke v. Mason*, Say. 264. *Norris v. Freeman*, 8 Wils. 39. *Jackson v. Sternbergh*, post, 162. If it be merely doubtful and

Hart v. Hosack.

HART *against* HOSACK.

As an accountable receipt given for a note borrowed, should be taken up when the note is settled. A child of fourteen years, put with a physician on trial, to see how he would like the profession, cannot make an election to become a student, so as to charge the parent with an apprentice-fee. In New York, no fixed rate of fees for taking apprentices in the medical line.

ASSUMPSIT for money lent and advanced, for money had and received; plea, *nun-assumpsit* and payment, with notice of set off. The plaintiff proved, and gave in evidence the following promissory note:

"Sixty days after date, I promise to pay Dr. David Hosack, or order, three hundred and seventy-five dollars, value rec'd. N. York, 5th February, 1800. Eph'm. Hart."

The plaintiff also proved, that he paid this note when it was due; and in addition proved, and gave in evidence the following accountable receipt:

contradictory it will not. *De Foncleau v. Shottenkirk*, 3 Johns Rep. 170. When the materiality of evidence is relied on, in addition to the requisites demanded by the decision in the text, the names of the witnesses must be specified, and what is expected to be proved by them; *Richardson v. Backus*, 1 Johns. Rep. 59, it is not enough to state what the party applying has been told they will say. *Shumway v. Fowler*, 4 Johns. Rep. 425. If the testimony go merely to impeach the credit of a former witness, a new trial will be denied. *Bunn v. Hoyt*, 3 Johns. Rep. 255. *Shumway v. Fowler*, *ubi sup.* especially so, if the witness whose credit is assailed be dead. *Durges v. Dennison*, 5 Johns. Rep. 248. But if the credit given to the former witnesses arose from circumstances which are falsified by affidavit, a new trial may be allowed. *Lister v. Mendell*, 1 Bos. & Pull. 427. The reason of this distinction appears to be, that mere affirmations and denials by word of mouth may be fabricated; circumstances and the happening of facts cannot. See *post*, *Steinback v. Columbian Insurance Company*, 2 Caines, 133, n. (a). See also *Jackson v. Sternbergh*, 1 Cai. R. 162. *Douglass v. Tousey*, 2 Wend. 352. *Keeler v. Firemen's Ins. Co.*, 3 Hill, 250. *Eaton v. Benton*, 2 Hill, 576. *Smith v. Hicks*, 5 Wend. 48. *Astor v. Union Ins. Co.*, 7 Cow. 202. *Jackson v. Loomis*, 12 Wend. 27. *Hollingsworth v. Napier*, 3 Cai. R. 182. *Carley v. Wilkins*, 6 Barb. S. C. Rep. 557, 565. *Esterly v. Co's*, 1 Id. 235. *Fleming v. Hollenback*, 7 Barb. S. Court Rep. 271.

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*“ I promise to ACCOUNT with Eph'm. Hart for his note payable to me for three hundred and seventy-five dollars, dated this day, at sixty days. N. York, 6th February, 1800. David Hosack.” From the facts of a case reserved, it appeared that the defendant is a physician, and alleged that the note was intended as an apprentice-fee for taking the plaintiff's son. In support of this defence, the defendant called witnesses, who testified that the plaintiff's son came to the defendant the latter part of the year one thousand seven hundred and ninety-nine, and continued with him till the spring of one thousand eight hundred; that the son was considered in the defendant's shop as a student; that the witness understood from the son, that he was to be some time on trial; but the witness did not hear him say how long; that the defendant's usual apprentice-fee is three hundred and seventy-five dollars; and the witness paid this fee to the defendant when the witness commenced his studies; that the witness has heard the son say he was to pay the defendant a fee of three hundred and seventy-five dollars; that the son had a ticket for the hospital, which was obtained for him by the defendant, and is only granted to regular students, and it would have cost five dollars to any other person; that the son had free admission to the defendant's library, and used his books; that one of the witnesses gave the defendant only one hundred and fifty dollars as a fee, owing to particular circumstances; that the son, after being about three months with the defendant, said he had been upon trial, but that he was now a regular student; that the son was a boy of about fourteen years of age; that the defendant's usual term of apprenticeship is three years; but there is no particular period fixed by agreement; that he had heard several physicians say that it was not usual to return an apprentice-fee; and one witness stated, that he had known an instance in which a return of the fee was refused.

Elias Noah, on the part of the plaintiff, deposed, that he was very intimate in the plaintiff's family; that the defend-

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ant, by letter, which the witness saw and read, informed the plaintiff he had occasion for money, and applied to the plaintiff to borrow his note. Upon this, the plaintiff made and delivered to the defendant the note above mentioned, and the defendant signed and delivered the receipt above mentioned; the witness always considered the transaction as a loan by the *plaintiff to the defendant, [*27] and nothing else; that the witness several times met with the defendant in the plaintiff's family; that the defendant was very solicitous to have the plaintiff's son come and study physic with him; that the defendant used much persuasion for this purpose, both with the plaintiff and with his son; that finally, the plaintiff and his son consented that the son should study physic with the defendant; that it was expressly agreed between the plaintiff and the defendant, that the plaintiff's son, if he went to study physic with the defendant, should have a right to quit the defendant whenever the plaintiff's son pleased to do so; that the son, after this agreement, went to study physic with the defendant; that he attended the defendant's shop but irregularly; that he adopted, after being some months with the defendant, an opinion, that he could not, from the acquaintance he had formed in New York, pursue his studies as closely as he ought to; and thereupon, he left the defendant, and went to Europe; that *the witness always understood that the son was merely on trial* with the defendant.

THE JUDGE charged, that this case did not depend on any general custom of the faculty, or of this defendant, in relation to the fee in question; but on the particular agreement; that the defendant had, no doubt, a right to fix what price he thought proper for his students; but, whatever might be his established fee, he was bound by an agreement he had made; that, on this subject, little dependence ought to be placed on the declarations of the plaintiff's son, who was no more than fourteen years of age; particularly, as he must be considered as under the control of

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his father. Neither ought much stress, in his opinion, to be laid upon the circumstance of the defendant's procuring the son a ticket for the hospital; as his father, or the defendant, might have thought it proper to procure the son a ticket, although he was merely on trial with the defendant; that if the jury believed that the son had gone to study with the defendant on trial, that the time for trial had elapsed, and that afterwards, the plaintiff and his son had elected that the son should continue and serve his apprenticeship with the defendant, then it would be their duty to find a verdict for the defendant; but if they believed that the son was with the defendant on trial, and that, by [*28] virtue of an agreement between the plaintiff and defendant, the son was entitled to leave the defendant whenever the son disliked to remain with the defendant, then it would be their duty to find a verdict for the plaintiff; deducting, however, from the damages, a reasonable allowance for the time the son was with the defendant.

The jury found a verdict for the defendant.

On the above facts, it was now moved, on the part of the plaintiff, to set it aside, as contrary to evidence.

Troup, for the plaintiff. The action was to recover money lent; the defence, that it was given as an apprenticeship fee. The question then is, whether, from the evidence, it was a loan or a payment. That it was the former, is manifest from the evidence of Noah, who saw the defendant's letter asking to borrow money. If the money was a payment, it was singular a request should be made to have it lent. It is not usual for creditors to borrow their debts due, and give accountable receipts for the amount. The agreement on which the plaintiff's son went is expressly proved; he was to leave the defendant when he pleased; and the receipt was, therefore, worded as an accountable one; because, if the son did not continue to complete his studies, only a proportionable sum was to be paid. The

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plaintiff did not contend the three hundred and seventy-five dollars were to be recovered without deduction; but that the defendant was not entitled to the whole, against his agreement and his receipt. No argument could be drawn from the election of the son, had it been clearly established: he was only fourteen years of age, and could not elect without the concurrence, and under the control, of his father. As to the defendant's witnesses, their testimony went to facts perfectly immaterial: the ground of the suit was the agreement; by that, no time was specified for electing to leave the defendant: whenever the election was made, and the plaintiff's son did leave the defendant, he was, upon his receipt, to account; and, for so much of the usual time of studying under the tuition of the defendant as was unexpired, a deduction was to be made: thus, and thus only, the contract in evidence, and the receipt, could be consistently explained.

Pendleton and *Hoffman*, for the defendant. The application can succeed only on two grounds; either that the verdict is against the weight of evidence, or against a rule of law arising out of the *facts. To decide on [*29] the first, the court must assume the office of jurors, and this they never do where there is evidence on both sides, unless it is by much the strongest on one side. The jury here have decided on the credibility of the witnesses; the court will not interfere with their province in that respect, to give another opportunity to weigh the credit of the same witnesses. This was never done, but when the testimony was by foreign witnesses, and taken abroad; then the court would do it to procure evidence of their credibility, because the jury must be ignorant of it; therefore, knowing only the credit of their own countrymen, they could not weigh it with that of foreigners residing abroad.(a) The note for three hundred and seventy-five dollars, made

(a) The researches of the reporter do not afford an authority for this dictum.

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by the plaintiff when his son was upon trial, was the reason of the accountable receipt. It was not an engagement to repay a loan, but to be accountable on a contingency, whether the son would be a student or not; there was no precise time for this: the son was on trial; when he chose to be a student, the trial terminated, the account was complied with, and there was to be no return; for the sum was fairly due. The dates of the transactions prove this; and afterwards the son is found to be a student by having a certificate gratis, which none but students could obtain without paying five dollars. The court must suppose him a student, or that the defendant had been guilty of a fraud, by signing a false certificate. Noah says the son was to determine whether he would be a student or not, and the other witnesses say the son did elect to become one. Noah swears positively to a fact he could not positively know, the destruction or loss of the letter, in which the defendant applied to the plaintiff to borrow money: and it is very singular he should apply to borrow the very sum due him for a fee, and that the application should be to the very man whose son was a student with him, in preference to all others. The reason why the receipt was an accountable one, was not because no time was fixed for the plaintiff's son to make an election, but because the defendant was not to be accountable after the trial had.

This construction is that which the jury put on the transaction.

A *pro rata* accountability, for one or two years, [*30] when it might please the son of the plaintiff to *leave the defendant, was absurd in the case of either a student of law or physic. If, however, the inference from the facts was doubtful, the jury have drawn a conclusion which, according to legal principles, must be decisive.

Harrison, in reply. The plaintiff is contending for his fair and just rights: if injustice has been done, this court will interpose, and grant a new trial. It is admitted that

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there was a period when the whole fee was not due; that is in evidence: there is no proof that at the end of four or five months the defendant could erect himself into a judge, and think himself entitled to the same fee as if the plaintiff's son had staid with him four or five years. The principle insisted on by the plaintiff is one that is found in every volume of law. Chancery is full of decisions of apportionment of apprentice fees,^(a) which depend entirely on the *quantum* of services mutually rendered,^(b) This is the constant rule of acting, unless some custom or usage of trade to the contrary, be established. Of this there is no kind of evidence: the defendant cannot make and set up one for himself. On this point, the defendant's witnesses speak only as to hearsay, and give one solitary instance of a custom, as it has been called. The usage, then, is out of the question; and the question depends on the agreement; of this, Noah's testimony is conclusive: it is also uncontradicted; and from his situation, connected with his acquaintance in the family, it is highly probable he knew all the circumstances of the contract better than any one else; nor could any one but Noah prove the loss of the letter asking a loan of money. He had seen and read the letter; and is

(a) On the bankruptcy of a master, the apprentice-fee is generally apportioned; the apprentice (or perhaps his father) being permitted to come in as a creditor, for the balance, after deducting a compensation to the master for the time served, (*Ex parte Sandby*, 1 Atk. 149,) or allowing the apprentice a gross sum out of the estate. *Barwell v. Ward*, *Ibid*, 261. Where a master turned away an apprentice on account of ill behaviour, and the indentures had not been enrolled, (note this,) chancery has ordered thirty pounds out of forty-five to be returned. *Thurman v. Abel*, 2 Vern. 64. But unless in the cases of bankruptcy and death of the master, the jurisdiction of the court of chancery seems very doubtful. *Argles v. Heaseman*, 1 Atk. 518. *Dillon's Case*, 1 Saik. 67; 1 Rev. Laws, 189, s. 9.

(b) *Newton v. Rouse*, 1 Vern. 460, one hundred guineas, part of an apprentice-fee, was ordered to be re-paid, the master having died within three weeks after signing the articles, though they expressly mentioned sixty pounds only should be returned, if the master died within a year. But see *Hale v. Webb*, 3 Bro. Ch. Rep. 80, where Lord *Kenyon*, then master of the rolls, said, the decision above had carried the jurisdiction as far as could be.

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it to be supposed the plaintiff would not have produced the letter, if he had been able? As he was not, and could not prove the loss himself, Noah only could do it; who, like all other third persons in similar situations, swears to his firm belief. A belief warranted by reason, and the question I have just asked. The agreement on which the son was taken, and the note given, is the only evidence that can affect the cause. The defendant's witnesses neither do nor can, speak to this. The certificate, use of the defendant's books, &c., are nothing to the purpose. We find the defendant acting with peculiar solicitude to get the plaintiff's son as a student; and the extraordinary liberality of the defendant's agreement, might not, if taken as [*31] the result of his anxious entreaty, be *thought so absurd as has been argued. The son was not obliged to elect when the note was due: no proof of the contrary; if it was so, and then the fee was payable, and the note accounted for, how comes it that the defendant never calls upon the plaintiff for the accountable receipt, but leaves it to be produced and made use of against him? Had the fee been absolutely due, at the end of sixty days, the receipt ought to have been demanded; and, as the plaintiff took up his bill, the defendant should have taken up his receipt. The defence of Doctor Hosack is to demand wages for labor not done; is contrary to every principle of natural justice, and, therefore, the court will grant a new trial.

Per Curiam. The plaintiff, on the trial of this cause, gave in evidence a promissory note of his own to the defendant. Elias Noah proves that this note was borrowed of the plaintiff by the defendant, on giving a receipt, promising to be accountable to him for it. The defence set up is, that the note was a fee to the defendant for taking the plaintiff's son as an apprentice. A motion has been made to set aside the verdict, as against evidence, and obtain a

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new trial. This, the court are of opinion, ought to be granted.

The receipt given by the defendant, which was never taken up or called for, and the testimony of Noah, both agree in proving the money to have been advanced upon loan; this testimony remains in full force, notwithstanding any thing that was proven on the part of the defendant. What is related of the son, that he was to be some time on trial, is in confirmation of the agreement stated by the plaintiff's witness. The only circumstance of any weight on the part of the defendant, is the further confession of the son that he was to pay three hundred and seventy-five dollars, and that he had been some time on trial, and was then a regular student. But this confession by the son, without the knowledge or authority of the plaintiff, ought not to conclude him. The fact, too, that the son soon after left the defendant, and went to Europe, proves that the reservation in the original agreement had not been waived. In short, the evidence does not warrant a verdict for the defendant; and a new trial must be awarded on payment of costs.

LEWIS, Ch. J.: If the plaintiff is satisfied that a proportion should be paid, might not a new trial be saved?

*Troup. There is a verdict for the defendant. [*82]

KENT, J.: Is there no objection to allow for five months, at the rate of the sum usually paid for three years?

Troup. None, if we can get rid of the verdict.

The parties not agreeing,
Rule for new trial granted.(a)

(a) On the new trial a second verdict was rendered in favor of the defendant.

Dow v. Smith.

Dow against SMITH.

Two hands, including the master, are not a sufficient crew for a vessel of 35 or 40 tons, from New-York to Edenton, in North Carolina, and the court will decide on the insufficiency.

An adjustment made on a full disclosure of all circumstances is conclusive, though some may be suspicious. Adjustment not to be opened except for fraud, or a mistake from facts not known.

THIS was an action upon an adjustment at sixty per cent. on a policy of insurance, upon the schooner *Industry*, from New-York to Edenton, in North Carolina, valued at five hundred pounds.

The policy was dated the 4th of April, 1795; on the 16th of the same month was made.

At the trial of the cause before Mr. Justice *Lewis*, on the 3d of July, 1801, the plaintiff produced the adjustment, and there rested his cause.

The defence set up was fraud. To prove it, the deposition of one Jonathan Stratton was adduced, stating, that in March, 1795, he sailed from the port of New-York, in the *Industry*; that there were no other persons but Joseph Dow, the master, and himself on board; that Dow said, the schooner was going to South Bay, on Long-Island, for which place the deponent was shipped; that the schooner had no cargo or ballast on board, but had provisions usual to go from New York to South Bay; that the schooner got aground on the beach, on the Jersey shore; that in a day or two after the accident, the captain left the schooner and went to New York, and returned to this deponent about a week after, and informed the deponent he had been to New York; that the schooner, to go to North Carolina, ought to have had four hands, including the master; thinks the schooner was about forty tons burden; that he never was at North Carolina, and does not particularly know the navigation, but has an idea of the necessity of four hands.

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To rebut this, the plaintiff showed the deposition of Joseph Dow, which stated, that about the 25th of March, 1795, he sailed from the port of New York, in the *Industry*, as master, on a voyage from thence to Edenton, *in North Carolina; that Jonathan Stratton was [*38] the only mariner on board, together with this deponent; that another hand was engaged to go, but that he fell sick, and left the vessel before she sailed; that he was not in New York until he came with Stratton, after the said vessel had grounded, nor did he ever inform Stratton that he had been in New York while he was so absent from the vessel as aforesaid; that there was no cargo on board, but the witness had between five and six hundred dollars, some in specie and some in bank notes, for the purpose of purchasing naval stores; that the money was not insured; that the schooner was about thirty-five tons.

To discredit Stratton, the plaintiff read a protest(a) made before John Keese, Esq., a notary public, in which the said Stratton had joined, which was as follows:

Before me personally came and appeared Joseph Dow, late master, and Jonathan Stratton, late mariner, of the pettiauger *Industry*, who, being duly sworn, depose as follows: That they sailed in and with the said pettiauger from Coney Island the twenty-sixth day of March last, in ballast, bound to Edenton, in North Carolina, with a light breeze from the westward; that about one o'clock in the afternoon of the same day, the wind haled round to the north, and from that to the northeast, and then to the east, and then began to blow so hard that they were forced to take single reefs in the sails, and take in the jib, and soon after to double reef the sails: at four o'clock the wind blew so violent that it split the foresail so much that they could not set it: they then set the jib, and made the best of their way for Sandy Hook, and on the twenty-seventh got round

(a) A protest, though not evidence in chief, is admissible to contradict the testimony of the person by whom made. 2 Esp. Rep. 490.

Dow v. Smith.

the Hook, and then the sails were so much frozen that they could not handle them; that they were obliged to let go their largest anchor, but a very heavy sea running, and the vessel pitching bowsprit under, she parted; that they then endeavored to claw off shore, but the gale continuing very severe, and the mainmast sprung, and the vessel *very leaky*, they were under the necessity of running the vessel on shore on a sandy beach, in order to save her, and for the preservation of their lives; that they used every exertion in their power to get the vessel off, but without any effect.

[*34]. *Upon this testimony, the jury found for the plaintiff.

... *Hoffman*, on behalf of the defendant, now moved to set aside the verdict, as against law and evidence; for fraud, and unseaworthiness. The facts, *he argued*, were sufficient to bear down any erroneous conclusion which had been made. The adjustment, on which the action is founded, was manifestly obtained by fraud, and the testimony could never induce a contrary opinion. The verdict is not only thus against evidence, but against law; for there was not a sufficient crew on leaving New York. Neither this circumstance, nor any other, was communicated to the insurers; the vessel was aground in South Bay on the 26th of March, and on the 4th of April there was no information of it in New York. This is enough to excite suspicion. From the deposition of Stratton it appears the captain went to New York, and the policy is effected on the 4th of April, when the vessel is laying aground. If he had tried to procure assistance, that should have been proved by those he applied to. From the time of her getting on shore, notice of her situation might have been sent to New York by land in twenty-four hours; by sea in less. This was like the case of *Fitzherbert v. Mather*, 1 D. & E. 12. There the agent of the plaintiff had sent orders for insurance by the post, but was informed of the loss of the vessel before the

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post went out, and did not contradict them: it was held to vacate the policy, because a concealment of a fact, that might have been made known. So here the captain was to this purpose the agent of the underwriter. The vessel, too, had no ballast on board when she left New York; the policy was at and from, and it was impossible to take it in at Coney Island, in the course of the night, so as to sail by daybreak next morning, with only one hand and a yawl. At all events, the going there was a deviation, as no usage is found to warrant it. The want of a bill of lading for the seven or eight hundred dollars, stated by the captain to have been aboard, must be taken as a supplementary circumstance to impeach his credibility, especially as he is contradicted in essential points by Stratton. But on the testimony of both, the insufficiency of the crew appears for two hands could not be adequate to the working a vessel of forty tons, as she is stated by one, or even thirty-five, as by the other. That on the incompetency of the crew the court had a right to determine in the [*35] same manner as on the point of seaworthiness.(a)

Jones, contra. This motion is made on two grounds: fraud, and the want of a crew. The court will observe,

(a) This position must, it is presumed, be taken with some qualification. Whether it shall be within the province of the bench or the jury, depends, it is conceived, on its nature; if it be technical only, it appertains to the bench; if actual and matter of fact, to the jury. On the accuracy of this distinction the reader can decide by recurring to the case of *Munro v. Vandam*, Park, 221, note, and that of *Farmer v. Legg*, 7 D. & E. 186, both cited 1 Lex. Mer. An. 309, 311. But in a case where the only circumstance was, that the vessel went down at once without any apparent cause, the supreme court decided that she was unseaworthy upon a case reserved.

Whether a vessel be seaworthy or not is a question of fact for the jury. *Patrick v. Hallett and Borne*, 1 Johns. Rep. 241. And on a demurrer to evidence, the circumstance of suddenly springing a leak, without any apparent cause, but in consequence of which the vessel is lost, is not sufficient to presume she was unseaworthy, if there be testimony that she was seaworthy at her sailing. *Ibid.* But when such an event is stated in a case reserved, and the evidence of seaworthiness is not made out, the court will presume she was unseaworthy. *Talbot v. Marine Ins. Co.*, 2 Johns. Rep. 130.

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that the action is brought after an adjustment, and therefore will demand very strong reasons for setting aside the verdict. It is remarkable, that every circumstance now relied on might have been availed of at the trial, and was in the full knowledge of the underwriter when he made the adjustment: for, by the protest submitted to the defendant, on the facts set forth, in which he made his adjustment, it appears every fact, date of sailing, &c., was told him. This protest was made on the 15th of April, and the adjustment on the 17th, with no other proof of loss submitted than the protest itself. In this Stratton joined; and, from the size of the vessel, the defendant must have known it was her whole crew. Every thing, therefore, was taken into consideration before the adjustment; and it was made, it being thought there was not any grounds to warrant a refusal to pay. The captain denies going to New York when he first landed: this was a point of who should be believed, the master or Stratton: the jury have decided. No one ever saw him in New York. There is no evidence of communication between the captain and plaintiff, who resided at Islip, forty miles from New York. On his arrival at New York he heard of a very severe gale of wind; it was a few days after his vessel sailed, and therefore he insured her., *Fitzherbert v. Mather* does not apply. There the agent was employed for the express purpose of making an insurance, and though a captain be an owner's agent, he is not an agent to insure. In the case cited the agent had ordered the insurance; he, therefore, was the person to communicate. The crew was sufficient; the vessel was only one of the South Bay craft, the captain says of thirty-five, not forty tons.

LEWIS, Ch. J. Both may be right: one may speak of carpenters' measurement, the other that of the custom-house.

Jones. Not being seaworthy for want of a crew, is a

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matter of fact for a jury: and on that they have determined; their verdict, therefore, not to be disturbed.

LEWIS, Ch. J. Does it appear how the vessel was rigged? Had she a bowsprit?

Jones. Yes, she had. The want of crew was insisted on *at the trial, and the verdict shows the [*86] jury's opinion. Dow had gone to North Carolina on the very voyage insured in a vessel larger than this with only three hands, including himself; this was only a pettissuger. As to the policy's being at and from, it is a mistake, the words are from New York; but granted they were otherwise, Coney Island is part of the port of New York.

Hoffman, in reply, insisted on the words at and from; that under them the vessel should be fit for sea when she first weighs anchor in prosecution of her voyage; that was done at her leaving the pier in New York, and had she been lost going to Coney Island, it would have been within the policy. The jury's decision on the sufficiency of a crew is not conclusive. Suppose they had determined one hand only to be enough, the court would have set aside the verdict. If the captain was in New York, the communication between him and the plaintiff must be inferred. For this, *Stewart against Dunlop*, in the House of Lords, Park, 209, is an authority.

Per Curiam. This is a claim for a total loss after having exhibited the usual proofs, and on these an adjustment was made. It is upon this that the action is brought, to which several grounds of defence are taken: first, that the adjustment was fraudulent; secondly, that the vessel had not any ballast on board when she sailed from the place at which the policy attached, and, therefore, was not sufficiently equipped; thirdly, that she had not a sufficient crew. We shall

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lay wholly out of view the two first grounds. It appears that previous to the adjustment all the facts now relied on were communicated to the underwriters.(a) The protest states the time of sailing from Coney Island, in ballast, the gale of wind, &c. All these circumstances and their dates appear from the protest to have been fully made known, and, therefore, all charge of fraud is at an end, because the adjustment was made by the underwriters with their eyes open. An adjustment cannot be opened except on the ground either of fraud or mistake from facts not known. On the third point we think there is sufficient reason to order a new trial. It now appears that the vessel was a schooner of thirty-five or forty tons burden, with three sails, and departed on a voyage from hence to Edenton, in North Carolina, with only two hands, the captain included. [*37] The vessel was, therefore, in our opinion, not *equipped for the voyage, and on this ground we think there ought to be a new trial. One hand and the captain were not a sufficient crew.(b)

New trial ordered.

(a) An adjustment, by the English authorities, is only *prima facie* evidence against the underwriter, impeachable for fraud, mistake in the law, or a material fact. *Christian v. Coombe*, 2 Esp. Rep. 489; 2 Marsh. 542, *et seq* Park, 117, *et seq*. Therefore, a legal exoneration, arising from facts known at the time of making the adjustment, may, at the trial, be availed of, by the insurer, *Herbert v. Champion*, 1 Camp. 134, and a fact is not to be supposed as known by him, merely because he might have made himself acquainted with it, as of a notice stuck up in the coffee-house; it must be "blazoned" on him. *Shepherd v. Chewter*, 1 Camp. 274. It seems, from the above authorities, that an adjustment is a mere admission of the sum due, if there be no fraud; and, upon the facts known, a right to recover.

(b) *S. P. Silva v. Low*, Lex. Mer. Am. 310, 324, since reported 1 Johns. Cas. 184, with the facts at full length. See the cases in Lex. Mer. Am. *sup*. Want of sails, as well as insufficiency of a crew, will render a vessel unseaworthy. *Wedderburne v. Bell*, 1 Camp. 1. To constitute her seaworthy, she must be equipped in such a manner as to render her secure against capture, as well as against the perils of the sea. As to unseaworthiness, from the want of documents, see *Price v. Bell*, 1 East, 663, and *Elting and others v. Scott and Seaman*, 2 Johns. Rep. 157, in which the court seem to be against the implied warranty of seaworthiness extending to papers and documents.

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THE PEOPLE *against* YOUNGS.

The first section of the act "regulating certain proceedings in criminal cases," does not extend to collateral issues. On such, if the prisoner stand mute, the court will enter a plea for him. On collateral issues no peremptory challenge. General sessions has no jurisdiction on indictments for a second offence in committing grand larceny. Indictments for second offences, where the punishment is increased, must set forth the record of the former conviction. Prisoner tried at general sessions for grand larceny and brought up here, on suggestion of its being second offence, this court will give no other judgment than the court below might have pronounced.

THE defendant had been convicted of grand larceny, before the *court of general sessions*, at Albany, in February last, and was brought up to receive sentence of imprisonment for life under the act of 21st March, 1801, c. 58, s. 4, as being his second offence.

The indictment under which he was now brought up did not set forth the record of the former conviction; but instead of it a suggestion, in the nature of a counterplea, had been entered against the prisoner in the following words: "And Ambrose Spencer, who prosecutes for the people of the state of New-York in this behalf, having heard Thomas Youngs, who stands convicted at a *court of general sessions of the peace* holden at Albany, in and for the county of Albany, on the seventeenth day of February last past, of feloniously and with force and arms stealing, taking and conveying away, at the city of Albany in the county of Albany, on the sixteenth day of February last past, one cotton, &c., (specifying the articles and their value,) of the goods and chattels of Edward Griswold, being asked by the court now here what he had to say for himself why judgment should not be passed against him agreeable to law, saith that the said Thomas Youngs ought to receive the sentence and judgment of the court now here to be imprisoned in the state prison, for life, and there

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to be kept at hard labor, because he says that the said Thomas Youngs, by the name of Thomas Young, heretofore, and before the said felony was committed in manner and form aforesaid, to wit, at a *supreme court of judicature*, held at the city-hall of Albany, in and for the state of New-York, on Saturday, the twenty-eighth day of April, in the year of our Lord 1798, before John Lansing, Esq., Chief Justice of the said *supreme court of judicature*, Morgan Lewis, Egbert Benson, and James Kent, Esquires, puisne justices of the said *supreme court of judicature*, was convicted on his plea of not guilty to an indictment for grand larceny, for feloniously, and with force and arms, stealing, taking and carrying away, &c., of the goods and [*38] chattels *of one John Wright, and thereupon it was considered and adjudged by the said court last mentioned, that the said Thomas Young be confined in the state prison in the city and county of New-York, at hard labor for two years, and this he the said Ambrose Spencer is ready to verify and prove by the record thereof; and the said Ambrose Spencer further saith, that he the said Thomas Youngs, who now stands convicted at the said court of *general sessions* of the peace, holden at Albany, in and for the county of Albany aforesaid, in manner and form aforesaid, is the same person who was so convicted at the said *supreme court of judicature*, holden at the city-hall of Albany, in and for the state of New-York, in manner and form aforesaid, and is not any other or different person. Wherefore, since the said Thomas Young hath already been duly convicted of the crime of grand larceny, committed since the said first conviction, the said Ambrose Spencer, for the people of the state of New-York, prays the judgment of the court here, that the said Thomas Youngs may receive judgment to be imprisoned in the state prison, in the city of New-York, at hard labor, or in solitude, or both, for life."

Spencer Attorney-General, prayed that the prisoner might

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be put to plead his identity, and, in case of his denying that he was the same person, that a jury might be summoned *instantly* to try the fact. This he contended was the right mode of proceeding, and for that he cited *The King v. Scott and another*, 1 Leach, 445.

To a question from the court, whether the prisoner wished for counsel, on being answered in the affirmative, they assigned to him *Hoffman* and *Colden*, who requested time to prepare themselves, which, the case being new, was granted.

On the prisoner's being brought up the next day, by advice of his counsel he stood mute. They insisting that as the punishment of *peine forte* was expressly abolished, and the first section of the law of 21st March, 1801, c. 60, applied only to cases of arraignment, the present was a *casus omissus*, in which the court had no power.

After some consultation on the bench, the court ordered the following plea to be entered:

*"That he is not the person alleged by the *Attorney-General* in his plea to have been formerly convicted of grand larceny." [*39]

Reserving to the prisoner a right to object to the mode of proceeding, and take advantage of any irregularity that might appear. His counsel then stated they meant to contend that the proceedings, not setting forth the record of the former conviction, were erroneous, and the court would not pronounce the judgment prayed for.

Spencer, Attorney-General. The identity of person and former conviction are circumstances collateral to the offence itself: they do not constitute a part of the crime, and therefore may be pleaded and replied to *ore tenus*, and a *venire* awarded returnable *instantly*, in the nature of an inquest of office. This is the constant practice in cases where it is doubtful whether a criminal be a lunatic or not; so, by analogy, the same mode should now be adopted.

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especially as it is a matter in which the court may exercise its discretion. 1 Hawk. 4, b. 1, c. 1, s. 4, n. (5). *Fost.* 46; 47. In Great Britain, when a prisoner is to be ousted of his clergy, the suggestion of his former offence is by way of counterplea, and the indictment never takes notice of the previous conviction. 4 Hawk. 254, b. 2, c. 33, s. 19, n. The only mode of trying whether he has before had his clergy is by the certificate prescribed under the 3 and 4 W. & M., c. 9, s. 7. *The King v. Scott and another*, 1 Leach; 445. If the section cited from the statute of W. & M. be compared with the second section of our *state law* of 14th of April, 1801, c. 146, 1 Rev. Laws of N. Y., 462, 463, the certificate ordered by our provisions will be found perfectly analogous to that required by the 3 and 4 W. & M. The first offence is grand larceny, punished in a certain manner; the second offence is the same, with a greater punishment. In England, the second conviction is not availed of in the indictment; but when the prisoner claims the benefit of his clergy, it is counterpleaded. This makes a perfect analogy. His identity may be tried by a jury of his country, with the aid of counsel and the right to challenge, at which time he may controvert his former conviction and indictment. Therefore, on principle, it is not necessary to connect the first with the second offence, as the repetition is no part of the crime, but collateral [*40] and only incidental to his guilt. All facts that do not enter into the crime, but are mere circumstances are to be inquired of in this way. The books of precedent are silent as to the practice insisted on, and that is an argument for the present mode; the form of the counterplea is warranted by Dogharty.

Calden and *Hoffman*, for the prisoner. There is no analogy between the present case and those which have been cited. It is not denied that to oust of clergy the mode is by counterplea. The present suggestion cannot be spoken of as being of the nature of counterplea; these are

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so called because counter to what is pleaded, or claimed by the prisoner after his conviction, when he demands the benefit of his clergy. To the plea which the prisoner has put in, to do away the force of the sentence, the attorney-general interposes his counterplea; but he cannot, after trial, suggest any new matter. If the crime was as is stated in the counterplea, or suggestion, the court below had no jurisdiction of the offence. Justices of the sessions are ousted of that both by the common law and express words of our state act of the 21st March, 1801, s. 1, Rev. Laws of N. Y., vol. 1, p. 302. The statute, after giving the justices a right to inquire of all offences, &c., and going on to confer on them a right to hear offences of grand larceny, has the following proviso: "Provided always, that it shall not be lawful for any of the said courts to hear and determine any indictment of, or for any treason, misprision of treason, murder, or other felony or crime, which is or shall be punishable with death, or with imprisonment in the state prison for life, but shall cause the indictments for the same to be delivered to the next supreme court, or court of oyer and terminer or gaol delivery, to be held in such city or county, there to be determined according to law." The question then is, is this a crime punishable with imprisonment for life or not? Is not this apparent on the record? If so, it is conclusive as to the jurisdiction. The court will recollect that the law referred to was passed with a direct view of restraining the justices in sessions from exercising any authority where the punishment was so severe. The legislature viewed them as a subordinate tribunal, and therefore delegated inferior powers according to the confidence entertained. The practice on the present occasion is not such as has been formerly used; the mode heretofore adopted has been to make the first offence a charge in the indictment for the second, and as this has [*41] been the line of conduct in this country, it may be considered as a contemporaneous exposition of our law. It is asserted that, though this method might be taken, it

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is only matter of form; it is a matter of form, however, which gives a jurisdiction the legislature has taken away. It is form in one point of view, in another not. This kind of alteration in criminal proceedings is not allowable. It is necessary that the previous offence should be made a substantive charge in the indictment for a second, where the punishment is augmented by the repetition, because the repetition is the crime. Reason tells us the second offence must be after a conviction for the first, for it is on a presumption of the first punishment's not having induced a reformation, that the second is increased. 1 Hawk. 306, b. 1, c. 40, s. 4. 1 Hale's P. C. 685. *Fleming's Case*, 1 Leon. 295. *Taverner's Case*, 3 Dyer, 323. The distinction between clergyable cases and the present is this: whether clergy has been allowed or not is not traversable, but here the nature of the crime is changed by a superadded fact; the party, therefore, must have an opportunity to traverse. The time at which the second offence was committed is of the essence of the crime. The counterplea is no evidence that the subsequent felony was after the 16th February, nor is any issue tendered of that fact. It ought to have been formally offered.

The necessity of such an issue will be more evident on recurring to s. 4 of the law declaring what crimes are punishable with death or imprisonment for life: (a) the second offence must be after such first conviction; if it be a question, then, whether the second offence was committed after the first conviction, it is a fact not inquirable here, but by a jury. Before them, for an offence subjecting to the punishment now asked, the prisoner is entitled to a peremptory challenge of twenty; (b) this right by the present mode is taken away; for on a collateral issue it cannot be exercised. *Radcliff's Case*, Fost. 42. Dogharty is a

(a) 21st March, 1801, ch. 58, 1 Rev. Laws of N. Y., 254.

(b) 21st March, 1801, c. 80, s. 2, 1 Rev. Laws of N. Y., 261.

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precedent in point, and in the very one adduced by Mr. Attorney, the former conviction is set forth.

Spencer, Attorney-General, insisted on his former arguments, and that this was properly a counterplea; because, when the prisoner is asked what he has to say why more than *fourteen years' imprisonment should [*42] not be awarded, he must allege the conviction to be on his first offence: this is his plea; then the suggestion read is the counterplea. The practice relied on has not antiquity enough to establish it, and the distinction between taking away clergy, and augmenting the punishment, amounts to the same thing, for they both vary the sentence. The idea under which the proceedings have been carried on is, that the trial might be below, and the judgment here.

Per Curiam. The prisoner was convicted at a court of general sessions of the peace, held in and for the city and county of Albany, of a grand larceny. The record of his conviction is removed into this court, on which a suggestion is entered that he had heretofore been convicted of a similar offence. On this the public prosecutor has moved for judgment of commitment to the state prison for life, according to the act in such case made and provided, or that the prisoner take issue on such suggestion. The court, doubting of the regularity of this mode of proceeding, assigned counsel. The point has been ably argued, and they are now to give their judgment.

From the authorities and precedents that have been laid before us, there can be little doubt, that in England, when a prisoner prays his benefit of clergy, and the question is, whether it hath not been on another occasion extended to him, this is the mode (under the appellation of a counterplea) that is generally pursued. In cases, however, where the first offence forms an ingredient in the second, and

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becomes a part of it, such first offence is invariably set forth in the indictment for the second.

A similitude is said to exist between the prayer of clergy in England, and a denial of a former conviction with us, and that therefore the same mode of proceeding is equally correct in the one case as in the other. But on strict examination, there will be found to exist no analogy between them, and that we cannot adopt the same mode of proceeding without depriving the prisoner of an important privilege secured to him by statute.

It is true that much inconvenience may, and probably will, arise from this decision. Few convictions for second offences will be likely to take place: but the remedy [*43] lies not within our reach. By a statute of this state every person who shall be indicted for an offence, the punishment whereof shall be, on conviction, confinement for life in the *state prison*, is entitled, when put on his trial, peremptorily to challenge twenty of his jurors. The form of proceeding now contended for would effectually deprive the prisoner of this right. It is no answer to this objection to say, his right of challenge may, on the trial of this collateral question, be extended to him, even should it be proper to allow it him on such occasions. He is entitled to it when tried for the principal felony, and had he not been deprived of it, might have been acquitted. Another objection, and a strong one, arises from the circumstance of his conviction having taken place before a court of sessions. The statute declaring the powers of justices of sessions expressly prohibits them from trying indictments where the punishment on conviction is confinement for life. Had it appeared, then, from the indictment that he was to be put upon his trial for a second offence, a plea to the jurisdiction would have tied up the hands of such court, and have carried his cause for trial to a tribunal that could have extended to him all his rights.

We are of opinion this court can give no other judgment in the case than such as the sessions might have done,

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which exceeds not the punishment of fourteen years' confinement.

Sentence for five years.

SMITH and STANLEY *against* J. and I. WRIGHT.

For goods shipped on deck and ejected, there is no contribution; nor is the owner of the vessel liable as a carrier.

THIS was an action against the owners of a ship, to recover the value of goods shipped on deck, and ejected.

At the trial it was admitted that the defendants were owners of the ship Charlotte; that the plaintiffs were owners of twelve bales of cotton, laden on deck, to be carried from New-York to Liverpool; that they were to pay one half of the freight which was paid for goods carried in the hold; and that the cotton, in a storm, was *thrown into the sea, for the preservation of the [*44] ship and the residue of the cargo, both of which arrived in safety.

Several eminent brokers, underwriters, and merchants were examined, and they all uniformly testified, that goods on deck, if lost, are paid for by the underwriters on those goods, without contribution from the assurers of the vessel or other parts of the cargo; that there was no instance of an average on contribution allowed, when a loss happened in this way; that they never knew of any such case occurring between an owner of goods on deck and the owner of the vessel; that goods on deck always pay a higher premium, even in summer double, in winter, about 7 to 8, and less freight than goods under deck: the freight is less by one half, or two thirds, or thereabouts, but always less; that they never before heard of a demand of this kind made against the owner of the vessel by the shipper of

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goods; that, the freight of goods on deck is less than when below, because they are not considered as at the risk of the owner of the vessel. One merchant said, he once owned goods on deck, which were lost by *jettison*; and being uninsured, he claimed nothing from the owner of the vessel or the other part of the cargo. He conceived it to be the general understanding, that, for goods ejected from the deck, no contribution is to be made by the owner of the vessel, or of the other goods.

By consent of parties, a verdict was found for the plaintiffs, subject to the opinion of the court, on a case to be made, as to the law, and the admissibility of the preceding testimony; it was agreed, that if, subsequent to the trial, any instances of usage could be ascertained by affidavit, they should be added; and, in case of judgment for the plaintiffs, if any controversy should arise as to the amount really due, it should be settled by indifferent persons. In case the opinion of the court should be against them, judgment to be entered for the defendants.

Per Curiam. The plaintiffs shipped on half freight, on the deck of the defendants' vessel, twelve bales of cotton for Liverpool; which, for the preservation of ship and cargo, were, in a storm, thrown overboard; and the question is, are they entitled to average? It is conceded, that to general average they are not: that the shippers of goods under hatches, and the insurers on ship and cargo, [*45] are not liable to contribution *on account of their presumed ignorance of any part of the cargo being placed in so perilous a situation.(a) But it is insisted there is not the same ground of exemption for the shipowners,

(a) Goods laden on deck are never contributed for; but a boat may be a subject of general average. *Lenox v. Marine Ins. Co.*, July, 1802. The reason why for goods laden on deck neither contribution nor general average, in case of ejection, can be claimed, is, that they themselves increase the danger of the navigation, and are taken on board, under an implied agreement that they shall be sacrificed, if it be necessary to eject.

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because such fact is to be presumed within their knowledge; and they are benefited by the extra freight. If this reasoning be correct, its effect would be to make the shipowners insurers of all goods laden on deck, without premium, and at half freight; which certainly would be the height of injustice.

It is sufficient for our purpose, that the usage has been against the allowance of average to goods placed on the deck of a vessel. This is proved to be the case, from the testimony of several insurance brokers and merchants, of long standing among us; some of whom carry it back as far as thirty years; a period, however, too short, it is said, to establish a usage. The true test of a commercial usage is, its having existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made in reference to it. This appears to be the case in the present instance. We are, therefore, of opinion, that judgment be for the defendants.

Judgment for the defendants.

MILLER *against* DRAKE.

The statute of frauds does not require the agreement to make a conveyance of lands to be set forth in the declaration. A contract for the benefit of a third person, will support an action by him with whom the contract is made. An averment of "being ready, prepared, and offering to execute a conveyance, according, &c., but that defendant did not attend, and has refused," is a sufficient offer to perform, by the plaintiff.

ERROR on a *certiorari* from the ten pound court.

It appeared, from the justice's return, that the plaintiff had agreed with the defendant to attend at a certain place, to receive a conveyance of some land from the defendant and his wife, to one Rhoam. The proceedings below were by the present defendant, to recover damages for the now

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plaintiff's non-attendance, according to his engagement. The declaration stated, that the defendant "did, together with his wife, attend at the place appointed, ready prepared and offering to execute to the said Jacob Rhoam a conveyance, &c., according to the aforesaid agreement." There was also a count for work and labor done with the defendant's wagon and horses.

Per Curiam. The errors assigned, and relied upon by the plaintiff, are these :

1. That the action before the justice was founded on an agreement for the sale of lands, and it did not appear from the declaration that *there was any note in writing of that agreement: which was therefore void, by the statute of frauds.

2. That the promise by Miller was for the benefit of one Rhoam, a third person ; and, therefore, without consideration as to Miller ; and for that reason, also void.

3. That there was no performance of the contract on the part of Drake ; it not being alleged that he offered a deed executed, or ready to be executed.

The first exception is clearly not well taken. Although the statute of frauds requires a note in writing to support a contract respecting the sale of lands, it is not necessary the writing(a) should be set forth in the declaration ; and it is sufficient if it appear in evidence.(b) The statute has not altered the form of pleading, which remains as it was at the common law.

2. The second exception, we think, is equally untenable. The action was founded on mutual promises ;(c) and the

(a) So of a promise to pay the debt of another. *Elling v. Vanderlyn*, 4 Johns. Rep. 237. What if the exception arise on demurrer to the declaration ?

(b) *Case v. Barber*, T. Raym. 450 ; Bull. 279.

(c) See *Livingston v. Rogers*, post, 583, as to mutual promises. With respect to considerations moving from the plaintiff to third persons, they have been ruled good considerations for a promise by another, if the promise be

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one promise was the consideration of the other. It was not necessary that the act promised to be done by Drake, should appear to be immediately beneficial to Miller, in order to support the obligation of his promise. It was sufficient that its performance would be detrimental to Drake, or deprive him of a right which he before possessed. An injury to one party, or a benefit to another, is sufficient consideration for a promise. By the agreement in this instance, Drake was to convey to another(a) his title to certain lands, in consideration of which, the promise on the part of Miller was made; and that consideration was sufficient.

3. With respect to the third exception, we hold the offer to perform is sufficiently averred in the declaration.(b) It is averred that Drake and his wife attended at the time and place appointed, "*ready prepared and offering to execute*" the conveyance, "*according to the said agreement*;" and that Miller did not attend; and that he has refused to accept the same, and to perform the agreement on his part.(c) This averment was substantially sufficient, and the manner in which the tender or offer to convey was made, was matter of evidence on which the justice has decided, and which cannot appear on the record.

made at the time of the contract, and it be an essential ground of the credit given, or consideration passed, to the third person, though he be the direct and principal creditor; but such promises being collateral, must be in writing. *Leonard v. Vredenberg*, 8 Johns. Rep. 39.

(a) *Quere*. If such other might not have maintained an action. *Dalton v. Pools*. 1 Vent. 318; *Marchington v. Vernon*, 1 Bos. & Pull. 101, n. c. See also Comb. 219; 8 Mod. 117; *Martin v. Hinde*, Cowp. 437.

(b) The principles as to averments of performance are, that when a plaintiff is to do an act by which he is to entitle himself to his action, he must show that act done, or at least that he has performed every thing within his power, (*Lancashire v. Killingworth*, Com. Rep. 117, cited in 2 Saund. 362, by Williams, n. 3, and the cases there;*) or that performance has been dispensed with.

See the New York Code of Procedure, sec. 162.

(c) See 1 Lex. Mer. Amer. 372, 373, the cases there cited.

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We are, therefore, of opinion, that none of the exceptions are well taken.

Judgment affirmed.

**WEAVER against BENTLEY.*

If a person bind himself under hand and seal to do a certain act for a certain consideration, and he fail, *assumpsit* will lie to recover back the consideration paid.

THIS was an action of *assumpsit* to recover back the consideration paid on an agreement under seal in the following words:

"November the 26th, 1796. Know all men by these presents, that I, Elijah Bentley, do bind myself to procure for James Weaver, lot No. 67, joining Ballcock's on the west, which lot I am now in possession of, which I promise to procure so far as this, on these conditions, that is, a lease to be either three years rent free, then to pay the interest of one hundred and sixty pounds yearly, for the term of ten years, then with paying one hundred and sixty pounds, to have a deed for the same lot, containing one hundred acres, which lease I promise to deliver by the first day of June next, and then if not called for, whenever called for. The condition of this obligation is such, that if I do not deliver the said lease, the two sixty pound notes, which are dated November the 26th, 1796, which I have against James Weaver, shall be of none effect. As witness my hand and seal.

"ELIJAH BENTLEY. [L. S.]"

On the trial of this cause before Mr. Justice Thompson, at the circuit court for the county of Herkimer, the plaintiff produced in evidence the agreement and affidavits of various payments by the plaintiff.

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The counsel for the defendant objected to the plaintiff's right of recovering in this form of action; insisting that the agreement was under seal, and imported a covenant, and therefore *assumpsit* would not lie; but the judge, after argument, directed a verdict to be taken for the plaintiff, subject to the opinion of the court on the point relied on by the defendant.

KENT, J., delivered the opinion of the court. The defendant covenanted to procure for the plaintiff within a given time, or on demand thereafter, a lease for certain lands, three years free of rent, then to pay the interest of 160*l*. annually, for ten years, in lieu of rent, and at the expiration of that period, to have a conveyance of the fee on payment of the principal sum; in default whereof two *notes of sixty pounds each, given by the plain- [*48] to the defendant, were to be void.

The plaintiff made certain payments in money and farm stock to the defendant, who failed to perform his covenant, and the plaintiff thereupon brought *assumpsit*; and the question now is, whether the action will lie, or the plaintiff be compelled to resort to his covenant.

This case is so loosely drawn that it scarcely affords sufficient ground for a decision. It is not stated for what the notes, money or stock were given; presuming them to have been the consideration of the covenant, the question then will be, whether the defendant having failed to perform on his part, the plaintiff may disaffirm the contract and resort to his *assumpsit* to recover back what he had paid. We are of opinion he had his election either to proceed on the covenant, and recover damages for the breach, or to disaffirm the contract, and bring *assumpsit* to recover back what he had paid on a consideration which had failed.(a) Judgment, therefore, must be for the plaintiff.

(a) But observe, this action cannot be maintained unless the contract on which the money has been paid is at an end. *Wiston v. Downes*, Doug. 23.

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LEWIS, Ch. J. RADCLIFF, J. and THOMPSON, J. concurred

LIVINGSTON, J. Two questions were submitted to us in this case.

1. Do the terms of the contract import a covenant?
2. Can the plaintiff waive covenant, and bring *assumpsit* to recover the consideration paid for the land?

In answer to the first it is only necessary to state, that the defendant "binds himself" under seal to procure for the plaintiff a certain lot of land, and "promises" to deliver the lease by a certain day. The words "bind and promise" create a covenant(a) as strong as any which could have been used.

It follows, then, that an action of covenant will lie on the instrument on Bentley's non-performance, to recover back all that has been paid. When that is the case the party must rely on the security he has taken, there being no necessity for the law to imply a promise different from the one contained in the terms of the contract. Promises in law exist only where there is no express stipulation between the parties; thus in 2 Term Rep. 100.(b) where a surety had taken a bond of indemnity from his principal, he was not permitted to resort to an action of *assumpsit* for the money he had paid.(c)[1] This is a stronger case, for if the present suit be maintainable for the money paid in consequence of this covenant, I see nothing to prevent the plaintiff from bringing an action on the instrument [*49] *itself, for other damages which may have been sustained by the defendant's non-performance, and thus

(a) But *quære*, whether, on these words, if to pay a debt, covenant would lie? though it will on "I oblige myself to pay." *Norrice's case*, Hard. 178.

(b) *Toussaint v. Martinant*.

(c) In *assumpsit* the plaintiff cannot give in evidence, a specialty to prove his debt. Moor, 340. If a man recover a debt against another, who pays it, upon which a release is given by the plaintiff, in which he promises to discharge the judgment and not sue out execution, which he afterwards does covenant, and not case, must be resorted to. 1 Roll. Abr. 517, A.

[1] See New York Code of Procedure, secs. 140-3.

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subjecting him to two suits for a compensation which might have been obtained in one; for these reasons I think it more safe to adhere to the rule which confines a man to the security he has taken, than to depart from it, merely because the merits may be with the plaintiff. The case of *D'Utrecht v. Melchor*, 1 Dall. 428, cannot be law. In my opinion there should be judgment for the defendant.

Judgment for the plaintiff.

MUIR and BOYD *against* THE UNITED INSURANCE COMPANY OF THE CITY OF NEW-YORK.

A vessel captured, recaptured, and carried into a port of the country to which bound, and in the way to that of her destination; information of all these circumstances being received at the same time, the assured cannot abandon. If, in such a case, she be restored on salvage, and afterwards, together with her cargo, be sold at auction, the charges of sale fall on the assured; the underwriter being liable for no more than the amount of the salvage, and the damage sustained under the policy.

Quære, if newspaper information be such on which an abandonment can be made?

THIS was an action of *assumpsit* on a policy of insurance, effected in the name of Archibald Gracie, on the cargo of the ship *Dauphin*, valued at eighty-seven thousand one hundred and sixty dollars, on a voyage from Surinam to London.

The cause was tried before Mr. Justice *Radcliff*, at the June sittings, in New-York, 1802, when a verdict was taken for the plaintiffs, subject to the opinion of the court on a case to be made.

By the case, the interest of the plaintiffs, the subscription of the defendants, and the sailing of the vessel on the voyage insured were conceded.

It was also admitted that the ship and cargo were cap

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tured by a French privateer, and, after being in her possession thirteen days, recaptured by two British frigates, carried by them into Plymouth, and there labelled for salvage; that a claim was interposed by the captain on behalf of the plaintiffs; that information of the capture, recapture, and arrival at Plymouth were received at the same time, through the medium of a London newspaper, and the cargo abandoned to the defendants the next day.

That a *bona fide* compromise for the salvage was made between the consignee of the plaintiffs and the captors, at one-eighth of the appraised value of the cargo, after deducting an eighth for sea damage, the amount of which was, on a reference, fairly estimated by the captain and prizemaster, but without unloading.

That on payment of the compromise, the vessel and cargo were delivered up to the consignee, and by him sent to the port of destination, where the cargo was sold at auction for the benefit of the underwriters. That, had it been sold at Plymouth to pay the salvage, it would not have produced, by 30 per cent., so much as it did in London.

That by the Act of Congress of the 2d March, 1799, s. 7, one-half of recaptured property is allowed as salvage, if it be in possession of the enemy above 96 hours. That the Supreme Court of the United States had determined the subjects of France to be enemies within the act.

That the rule of salvage adopted by the British Court of Admiralty, in London, as to American property, is that which is applied to British property under the 33 Geo. III. c. 66, s. 12.

That by this statute one-eighth of recaptured property is allowed if retaken by a single king's ship; if by more than one, so much as the judge of the Court of Admiralty, or other court having cognizance thereof, shall order.

That in consequence of the sale at auction, the cargo was subjected to charges, amounting in the whole to 772*l.* 8*s.* sterling.

[*50, 51, 52, 53] *It was agreed, if the court should be of

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opinion that the plaintiffs were entitled to recover a total loss, that judgment should be entered in their favor for twenty-five thousand five hundred and eighty-one dollars. But if the court should be of opinion, that the plaintiffs were entitled to recover only the amount paid for salvage, the auction duties, together with the expenses incident to the sales at auction, and also the damage, loss, and injury the cargo sustained while in the hands of the captors and recaptors, then the verdict should be for the sum of nine thousand five hundred and sixty-one dollars and twenty-four cents; but if the court should be of opinion, that the damage sustained by the cargo had not been properly ascertained, or that the charges attending the sale at auction in London were not properly incurred, then, and in such case, a proportionate deduction to be made for the benefit of the defendants.

Per Curiam. The question arising from these facts is, as to the extent of the plaintiffs' right to recover.

This, we think, is not a case of a total loss. The news of the capture, recapture, and arrival at Plymouth, all come together; (a) and the only pretence of a total loss ex

(a) It is universally conceded, that in such a case there is no right to abandon. *Hamilton v. Mendes*, 2 Burr, 1198. But whether the right shall be governed by the knowledge of the facts on which founded at the time of abandonment made, or whether, by the real facts as existing then, or at the time of action brought, has been *vexata questio*. In *Church v. Bedient and others*, 1 Osborn's Cas. in Err. 21, and *Hallett v. Peyton*, Ibid: 28, the court determined that if the facts at the time of abandoning prove the loss only partial, a total loss cannot be recovered. In *Bainbridge and another v. Neilson*, 1 Camp. 237, Lord Ellenborough seemed to be of opinion, that the actual state of facts, and not their known or supposed state, at the time when the abandonment is made, ought to determine the right; but, on an argument at bar, in the same case, the K. B. appears to incline to the opinion that the right to abandon ought to be regulated by the state of things at the time of action brought. See also *M'Carthy v. Abel*, 5 East, 388, and *Thelluson v. Sheddon*, 2 N. R. 230. In Massachusetts the loss, as at the time of the offer to abandon, decides the right. See *x. Boardman*, 3 Tyng, 248, but in *Dorr v. New England Ins Co.*, 4 Tyng, 220 this principle seems doubted. In *Rhineland*

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isting when the abandonment was made, is founded on the claim of salvage. The amount of this could not be ascertained with certainty, from any information possessed by the assured, at the time of the abandonment. Although by the act of Congress of 2d of March, 1799, s. 7, the salvage of vessels and goods recaptured from the enemy, after having been in their possession ninety-six [*54] *hours, is established at one-half their value; and the rule adopted in the English admiralty, as to salvage, is founded on principles of reciprocity, and regulated by the laws of that country to which the recaptured property belonged, yet Sir *William Scott* declared, on the 7th of December, 1798, that it was the practice of the English admiralty to restore American property on the rule of the English admiralty, *without inquiring into* the practice of America. The English rule of salvage is one-eighth, if recaptured by a single ship; and if by the joint operation of two or more, the salvage is left to be settled by the admiralty, according as it shall judge fit and reasonable. Under the circumstances, then, of this case, the rule of salvage would not be considered as going beyond one-eighth. There was not, at least, any definitive or certain ground for estimating it higher. And as *matter of fact*, we find that the salvage was, at the time, liquidated and settled between the consignee and recaptors, at one-eighth. The information received by the insured, upon which the abandonment was made, was a mere newspaper account; and if information, in any case, derived through such a channel, would be sufficiently authentic to warrant an abandonment, (a) we think, in the present instance, it was too imperfect to afford sufficient *data* to the insured to calculate his actual loss.

1. *Insurance Company of Pennsylvania*, 4 Cranch, 29; *Marshall v. Delaware Ins. Co.*, 1b. 202, and *Alexander v. Baltimore Ins. Co.*, 1b. 370, the real state of the loss at the time of the abandonment made, is said to be the proper and safe criterion. The same rule is adopted in Pennsylvania. *Dutth v. Gatiff*, 4 Dall. 440.

(a) A mere report sufficient, if it prove true. *Bainbridge v. Nelson*, 1 Comp. 237.

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We are of opinion, therefore, that the plaintiff, is not entitled to recover as for a total loss; nor, that the charges attending the auction can be considered as a loss, within the policy, to be borne by the underwriters. It was a voluntary act of the consignee; done, probably, in consequence of information of the abandonment; and made, therefore, at the peril of the owner. Had the sale at auction been to ascertain the injury the cargo had received, and limited to such parts as were damaged, it would have been a reasonable charge; but that appears not to have been the object or effect of the auction. The damage had been previously liquidated by the captain and prizemaster; and if those damages, together with the salvage paid, be allowed against the defendants, it is all the case will warrant.

We are, therefore, of opinion, judgment ought to be for the plaintiffs, for the salvage and damages only.

Judgment for salvage and damages.

*HUGUET, Assignee of the Sheriff, *against* [*55]
HALLET.

Entering into an agreement in the nature of a rule to stay proceedings on a bail bond, and, after notice of bail, declaring in the original action, is a waiver of a right to a plea in the bail bond suit; if the plaintiff proceed on the bail bond, he will be entitled to costs only up to the time of the notice of special bail, and on payment of those, all subsequent proceedings will be set aside.

Soon after this suit was commenced, the attorneys for both parties entered into an agreement, in the nature of a rule to stay proceedings on the bail bond, on the usual terms. The defendant in the original suit accordingly filed special bail, and gave regular notice, but had not paid the costs of this suit, as by the terms of the agreement he was

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bound to do. The plaintiff, on special bail being entered, went on in the original suit, and in July, 1802, obtained final judgment, on which execution was issued, and satisfied. The plaintiff afterwards proceeded in this suit, entered a default, in January last obtained final judgment, and issued an execution, on which the sheriff, by direction of the plaintiff's attorney, levied the costs only, but still had them in his hands. The defendant, in the last vacation, obtained an order to stay all proceedings.

An application was now made that the sheriff restore to the defendant so much of the money in his hands as should exceed the costs which were due on the bail bond suit when the agreement to stay proceedings were entered into, and to set aside all that were subsequent.

From the affidavit read, it appeared that the attorney for the plaintiff had frequently given the attorney for the defendant verbal notice that he was proceeding with the bail bond suit; but no bill of costs had been presented by the plaintiff, nor any demand of a bill or tender of the costs made by the defendant.

Calden, for the defendant, contended that special bail being filed under the agreement, with an intent to stay the proceedings on the bail bond, the plaintiff could not accept the bail, or avail himself of their being put in, unless the agreement was to have that operation.

That the plaintiff could not proceed with both suits: at most he had but an option to proceed with either, but having elected to pursue the original suit, he thereby precluded himself from going on with the other.

[*56] *That after the defendant had filed special bail, the plaintiff might have gone on with his original suit, and the court would probably have compelled him, by attachment, to pay the costs in that on the bail bond, up to that time.

...That there was no precedent for this double proceeding, which was a strong evidence that it could not be right.

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Stuyvesant, contra.—It was the duty of the defendant to have paid the costs on the bail bond, when he gave notice of special bail. The plaintiff had no other possible remedy for his costs than the mode he has adopted, and as the defendant's irregular conduct has compelled the plaintiff to proceed, the whole costs are due from the defendant, and are nothing more than the result of his own irregularity and obstinacy.

Per Curiam. This is a motion to set aside proceedings on the bail bond on the facts stated by the affidavit. The original suit was commenced in January, 1802, and the writ returnable in April. Afterwards, in May, the action on the bail bond was brought. Shortly after, the plaintiff's attorney received notice of bail in the original action, and then delivered a declaration. He went on to judgment, and issued his execution, which was fully paid. After this he proceeded on the bail bond to recover costs. The plaintiff's attorney states that he called on the attorney of the defendant, and requested him to pay the costs on the bail bond which he did not do. On this proceedings were continued in the bail bond suit to judgment, on which an execution has issued for the costs. The application is to set aside the proceedings and execution in the bail bond suit. It is established, with respect to tendering costs on a rule to stay proceedings on the bail bond, that it is the defendant's duty, when the rule is obtained, to plead and tender costs.^(a) There was no rule to stay proceedings: but an equivocal agreement in the place of that rule, and should receive the same construction. It was the duty of the attorney of the defendant to plead and pay costs. This would have been ordered had the plaintiff not proceeded in the original suit;

(a) *Common, manuscript, ads. Cathcart, Cole. Cas. 80. Ezonereker ordered on payment of costs; no demand or bill presented. Plaintiff went on. Per Curiam. The costs should have been paid without waiting a demand or bill. S. P. Durell v. Stanbury. The relief now to be, on paying of costs ordered, those of subsequent proceedings, and resisting this application.*

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but when he did that, it was a waiver(a) of his proceedings on the bail bond, and a waiver of the right to a plea in the suit upon it. The proceedings must be set aside on payment of costs up to the time when special bail was entered, and notice of that bail given.

On payment of costs up to notice of bail.[1]
 Motion granted.

 [*57]

*POTTER against BRIGGS.

After a lapse of five years the court will not order a *formet nisi* to amend his return, according to the truth of this case by stating that the defendant had escaped from prison, if it was at a time when many others forcibly broke out.

THIS was an application to the court for an order on the heretofore sheriff, Lansing, to amend a return according to

(b) The general rule is, that proceeding in the original suit is a waiver of the bail bond, and *vice versa*, proceeding on the bail bond to judgment and execution a waiver of the original suit. *Beecker v. Simmons*, 1 Johns. Rep. 119. But where the plaintiff merely settles the original suit, if the costs on the bail bond be not paid, the bail bond suit may be continued for their recovery. *Calkin v. Norton*, Caines' Prac. 91, from MS. Kent, C. J. So for the recovery of them in the original suit, if it has been settled on a promise to pay them, and that promise never performed. *Groves ad. Campbell*, Colo. Cas. 118. But note, to warrant a proceeding on the bail bond, an exception to the bail above must, as has been ruled, be entered. *Phelps ad. Ferris*, Cole Cas. 95. *Qu.*, however, as to this being in all cases law, if the decision in *Dubois v. Phillips*, (5 Johns. Rep.) be the rule. It is a general rule that when a suit is settled on an agreement to pay the costs, if they be not paid accordingly, the court will not stay proceedings, when continued for their recovery. Therefore, if an action against the acceptor of a bill be settled, on an agreement that the defendant shall give a new bill, and warrant of attorney to secure the amount, and also pay the costs, if he give the new bill, execute and deliver the warrant of attorney, but do not pay the costs, an action may be brought on the old bill, while the new is outstanding in the hands of a third party. *Norris v. Aylett*, 2 Camp. 229.

[1] See New York Code of Procedure, sec. 191.

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the real truth of the case. The facts were, that the defendant had been arrested and duly committed to gaol, but was one of many others who had broken out of prison, in the year 1798. The sheriff had been ruled, and had returned the due execution of the writ, a delivery of the defendant's body over to one of his deputies, and a rescue, but omitted totally the commitment to prison.

Troup, on an affidavit stating the preceding circumstances, insisted on the court's being under a moral obligation to order a return according to the truth of the case. That by the false one made, the sheriff avoided that liability for the full amount of the debt, from which nothing but an enlargement by public enemies of the state could exonerate him. It was a device to get rid of his legal responsibility; to leave the plaintiff only to his action for a false return, in which he could recover no more than his damage, actually sustained, and in which the defendant's insolvency might be urged against a recovery of any thing.

Harrison, contra, observed, that *Troup* had stated the very reason why his motion should not be granted; that of the plaintiff's having it in his power to obtain a compensation in an action for a false return, to the full amount of what he really had suffered. The proceeding now was, to get from the sheriff a debt, of which not one shilling could ever have been obtained from the defendant. That the escape was at a time, full in the recollection of the court, when a number of the debtors broke out of the city gaol. Several had been indicted and sentenced to the state prison. The application too was very stale; the second sheriff was now in office since the escape, and five years had elapsed in silence. Perhaps the court might have some doubt how far it could in this manner interpose.

Troup, in reply, insisted on his former position.

Per Curiam. The plaintiff is not without remedy; he

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has his action on the return. We do not say that in no case shall a return against truth be amended, but in this, under all its circumstances, we think the plaintiff must be left to such redress as the law will give him without our interference.^(a)

Motion denied.

[*58]

*M'VICKAR & Co. *against* ALDEN.

Whilst a public prosecutor is attending the duties of his office, his causes, though called on, are not put at the foot of the calendar; but if after the court of *oyer and terminer* is adjourned, younger issues be tried, he will lose his preference and be liable to nonsuit for not proceeding to trial, in the same manner as other persons.

THIS was a motion for judgment as in case of nonsuit for not proceeding to trial according to stipulation.

Riker, district attorney, opposed the motion on an affidavit stating that he was employed for the plaintiff, and had been prevented, in consequence of his official duty as public prosecutor, from attending the court when the cause

(a) *Potter v. Lansing*, see 1 Johns. Rep. 215, an action on the case for this very escape, in which 3,000 dollars were recovered by the plaintiff; but a new trial ordered; *Kent*, C. J., *Spencer and Tompkins*, Justices, thinking there ought to have been no recovery; *Livingston and Thompson*, Justices, *contra*. After a lapse of 20 years no judicial proceedings can be set aside for irregularity. *Thompson v. Skinner*, 7 Johns. Rep. 558. But after a lapse of 12 years a rule for an attachment was granted against a sheriff for not returning an execution delivered to one of his deputies. *Brockway v. Wilber*, 5 Johns. Rep. 356. Note, however, that he might have purged himself on interrogatories, and, therefore, in this very cause, he was discharged on showing that the *f. fa.* had been delivered 14 years ago to his deputy, who had absconded, and died abroad, and it did not appear what had become of the writ. *The People v. Gilleland*, 7 Johns. Rep. 555, citing, by the name of *Brockway v. Willie*, the above case.

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was called on, and had not afterwards been able to bring it to trial.

Boyd, for the defendant. The public prosecutor was only counsel: it is true the attorney is his brother acting with him; but the case is a hard one. The defendant was a captain of a ship in which the plaintiffs had shipped several bales of cotton, all of which had been delivered according to the bill of lading; but one, not worth more than sixty dollars, had been damaged, and he had been held to bail for the whole shipment, to the amount of two thousand, had been obliged to deposit property to obtain special bail, kept here many months, and had lost, by the detention, more than the sum for which he was arrested.

RADCLIFF and LIVINGSTON, Justices. To public officers in the city of New York, where the different courts are held at the same time, indulgence has always been shown. Their causes have been called on, but not put down to the foot of the calendar if engaged in official duty. They did not lose their preference of other causes, when the public officers attended. An official situation would otherwise subject them to peculiar hardships in this city, though in other parts of the state the same inconveniences do not exist.

RADCLIFF, J. wished to know whether, after the adjournment of the court of oyer and terminer, any causes, younger than the one in question, had been tried.

THOMPSON, J. There has been *laches* in the plaintiffs: the stipulation shows this is the second. The plaintiff ought to have employed other counsel, for the defendant should not be prejudiced: being concerned as public prosecutor ought not to cause any injustice to the defendant: (a) he ought to have the effect of his motion.

(a) See *Alton*. 2 Caines' Rep. 246, in which it was ruled, according to the opinion of Thompson, J., that being a public officer is no excuse for not going to trial.

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Riker, for the plaintiffs, offered to consent to common bail.

LIVINGSTON, J. As the plaintiffs have consented [*59] to common *bail though not imposed, Judge *Radcliff* and myself think the motion must be refused. The plaintiffs, however, will stipulate, and pay the costs of the last circuit.

On its being suggested that younger causes had been tried at the circuit, after the court of *oyer and terminer* had risen, the court deferred pronouncing judgment till the calendar should be examined and that fact ascertained. By a certificate from the clerk of the court, it appeared that the present suit had been called and passed, and the affidavit of the defendant's attorney stated, that younger issues(a) had been determined. On these grounds the court ordered judgment as in case of nonsuit, saying the certificate(b) of the clerk was equivalent to an affidavit, and it must be intended the cause had been regularly passed.

Judgment of nonsuit.

 VAN NESS against GARDINER.

Last proclamation of a fine made *nunc pro tunc*.

THE last proclamation of a fine had been omitted; it ought regularly to have been made last term; the application now was to have it made *nunc pro tunc*, and endorsed as of the last term.

(a) *Weed v. Ellis*, *post*, 115; *Jackson v. Valentine*, 3 Caines' Rep. 128: younger issues being tried, not always proof that a cause might have been brought on.

(b) S. P. *Wright v. Murray*, 7 Johns. Rep. 286. But a copy must be served when relied on in support of a motion. *Fisk v. Bryden*, 3 Johns. Rep. 244.

Ex parte Manning.

Per Curiam: We see no objection to it at present.(a)[1]
Motion granted.

EX PARTE MANNING.

A public prosecution must be at the expense of the prosecutor, unless, on disclosure of his circumstances to the court, they find him an object of public charity.

THIS was an application on petition to be allowed the expenses of a criminal prosecution.

Per Curiam. The court is called on to allow against the county of Albany, an account for expenses incurred by a prosecutor in carrying on a public prosecution. The application is made under the fifteenth section of the act(b) "regulating certain proceedings in criminal cases." This clause, taken in connection with the one that follows, we consider as limiting the discretion of the court to those persons who are objects of public charity, and as never intended to apply to those who can bear the expense of discharging their duty by a public prosecution.

The next clause limits the discretion of the court to twenty-five dollars: and this, according to the 15th section, only on consideration of the circumstances of the prosecutor: the words are *his* circumstances: therefore, till they *are* disclosed, the court has not any discretion to allow compensation. However hard it may be to individuals to attend a suit, and to compel a witness to leave his home, that is a subject in which the legislature must interfere. We can give no other consideration to this

(a) *Quære tamem.*

(b) 21st March, 1801. See 1 Rev. Laws of N. Y.

[1] Fines abolished, 2 Rev. Stat. p. 343, s. 24.

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than what the interpretation of the act allows. There are charges here for sums paid to witnesses, and the act states that no witness is to receive a compensation, unless poor

The *Attorney-General* observed, allowances, similar to that prayed for, had been made at *oyer and terminer*.

LIVINGSTON, J. When presiding in that court I have refused them, and decided according to the opinion of the court now delivered.(a)

Petition denied.

 JENKS and others *against* HALLET and BOWNE.

A vessel driven by distress into a French port, where a part of her cargo is taken by the officers of the government, and she prevented from taking away her original lading, may, without incurring the penalties of the acts forbidding all intercourse with the dependencies of France, purchase and load with the produce of the country. A passport granted by any particular government to protect against its own cruisers, is not a sailing under the protection of the flag of that government, so as to stamp a national character on the vessel. On a special verdict the court cannot intend any thing which is not found.

THIS was an action on a policy of insurance. A special verdict was, by consent, found, subject to the opinion of the court, as to the plaintiff's right to recover, upon the facts contained. From these it appeared, that on the 27th of April, 1799, the defendants, for a premium of 25 per cent., insured for the plaintiffs *against all risks*, 1,000 dollars upon coffee, valued at 20 cents per pound, on board the sloop Nancy, from Hispaniola to St. Thomas.

That in the margin of the policy was inserted, "warranted the property of the plaintiffs, all Americans," but that the words *all Americans*, were added after the policy was subscribed.

(a) Poor witnesses attending on *subpoena* allowed expenses. *The People v. Duwelle*, Cole. Cas. 35.

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That the sloop Nancy was built at Rhode Island, and belonged to citizens of the United States, resident in Rhode Island, as well when she left that state as at the time of her capture, and, being chartered by the plaintiffs, sailed from Newport, in Rhode Island, on the 12th of December, 1798, on her first voyage to the Havannah; that in the course of that voyage she was compelled, being in distress, to put into Cape Frangois, in the island of Hispaniola, a country in the possession of France, where she arrived on the 5th of January, 1799; that the captain and supercargo of the sloop were part owners of the cargo, and are two of the *plaintiffs in this suit; that having so put into [*61] Cape Frangois, the cargo was landed to repair the vessel; that the public officers acting under the French government there, took nearly all the provisions from on board the sloop, but the captain and supercargo were permitted to sell, and did sell, the remainder, to different persons there; that, for the provisions taken, the captain and supercargo were to be paid in thirty days, which payment was not made; that with the proceeds of the remaining parts of the cargo they purchased the whole of the cargo which was on board at the time of the capture; that the officers forbade the master and supercargo from taking on board the cargo landed from the vessel, or from conveying from the island any specie, in consequence whereof, they were compelled to take the produce of the country in payment; that the sloop, with 30,000 weight of coffee on board, 25,000 weight of which was intended to be insured by the present policy, sailed from Cape Frangois, on the 23d of February, in the year last aforesaid, on the voyage mentioned in the policy of insurance, having on board the usual documents of an American vessel; that the sloop, in the course of her said voyage, was captured by a British frigate, and carried into the island of Tortola, and vessel and cargo libelled, as well for being the property of the enemies of Great Britain, as for being the property of American citizens trading contrary to the laws of the United States;

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that, at the time of the capture of the sloop, the following paper was found on board :

" *Liberty, Safe Conduct, Equality.* At the Cape, 11th Thermidor, sixth year of the French Republic, one and indivisible. The general of the division and private agent of the Executive Directory at St. Domingo, requests the officers of the French navy and privateers of the republic, to let pass freely, the American vessel called the master property of Mr. E. Born Jenks, merchant, at Providence, state of Rhode Island, in the United States, arrived from the said place to the Cape Francois for trade and business. The citizen French [*62] consul, in the place where the said vessel shall be fitted out, is invited to fill with her name, and the captain's, the blank left on these presents; in attestation of which he will please to set his hand hereupon.

(Signed)

"J. HESLOUVILLE,

(Signed)

"GAUTHIER,

"*The General Secretary of the Agency.*"

That the above paper was received on board the sloop at Cape Francois, and was on board when she left that place; that the property insured by the policy aforesaid was claimed by Zebedee Hunt, and was condemned by a sentence of the said court of vice-admiralty, in the following words: "that the said sloop Nancy, and cargo on board, claimed by the said Zebedee Hunt, are enemies' property, and as such, or otherwise, liable to confiscation, and, therefore, condemned as good and lawful prize to the captors." That the plaintiffs are Americans, and were owners of the property insured, and that the same was duly abandoned to the underwriters.

Hamilton and Pendleton, for the defendants. The plaintiffs are not entitled to recover. First, because the warranty is not true. Secondly, because the voyage insured was illegal.

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On the first point. The sentence states that it is enemy's property: and even if not, the privilege of neutrality was forfeited, by the part owner's accepting a passport from another country, and sailing under the protection of that flag. In the case of the *Vigilantia*, 1 Rob. Ad. Rep. 18, 14, 15, Sir William Scott expressly lays it down; that a vessel, sailing with the pass of a foreign country, shall be deemed of that country whose pass she carries. It cannot be contended that the paper alluded to was a clearance. That, according to 1 Valin, 282, contains "the name of the master, and of the vessel, its tonnage and cargo, the port of departure and destination." Here blanks are left, and the paper bears date before the arrival of the vessel, showing it was made out for her, on a preconcerted plan of trade and business.

On the second point. It is only necessary to look at the dates of the act of Congress and the transactions. The first act was passed in June, 1796, to take effect on the first of July following; the second, on the 9th of February, 1799, to be in force on the 3d of March following: both these acts require a bond to be given not to enter French ports for trade and *traffic, nor to trade there though [*63] driven in by stress of weather. The Nancy sailed the 12th of December, 1798; put into the Cape, January, 1799: sailed on the 23d of February following, and on the 28d of April next the policy was effected: under the acts of Congress, therefore, the selling her cargo was illegal, as even in cases of putting into French ports from distress, traffic is forbidden.

Hoffman and Bogart, for the plaintiffs. The jury have expressly found the warranty to be true, and the inconclusiveness of foreign sentences(a) is settled in the cases of *Vandenheuvel v. Church*,(b) and *The Same* against *The United Insurance Company of New York*. This, therefore, is a

(a) *Johnson and Weir v. Ludlow*, 1 Caines' Cas. in Err. 29; *Vandenheuvel v. United Ins. Co.*, 2 Caines' Cas. in Err. 217.

(b) 1 Lex Mer. Am. 337, 341.

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complete answer to the first objection. But, as the sentence is ambiguous,^(a) and assigns as a cause of condemnation that which the law of nations does not warrant, it is doubtful whether, in England, it would not be examinable. 1 Marsh. on Ins. 291, 294 *Bernardi v. Motteux*, Doug. 575. The paper talked of as a pass was merely a clearance and passport to secure against seizure by French vessels: nor can the citation from Valin be supposed to be the obligatory form on all people, according to the positive rule of the law of nations. The second objection is of as little force as the first. The policy was subscribed by the defendants with a full knowledge of the facts and law. Though against a statute prohibiting certain voyages such a circumstance could not prevail, it was expected the underwriters would not have made it a ground of defence. The distress, however, and force, which are stated in the special verdict, do away every obstacle to a recovery from the pretended illegality of the voyage. The case of *Richardson and others*, in the District Court of New York, affirmed upon an appeal to the Circuit Court of the United States, was stronger than the present, and is on this head a full exposition of the act of Congress. There a vessel bound to a neutral country was captured, carried into a French port, together with her cargo, condemned and sold; the owner voluntarily purchased at that place another vessel, loaded her with sugar, and came to New York; she was seized and libelled under this very act; the judge of the District Court acquitted both vessel and cargo as not within the spirit of the statute. This decision, from its confirmation in the Circuit Court, is now the law of the union.

[*64] **Per Curiam.* It will be observed that this is the case of a special verdict, and the court can intend nothing but what is found by the jury.[1] This remark is an answer to much of the reasoning on both sides,

(c) See *Vase v. Ball*, 1 Lex Mer. Am. 333.

[1] *Seward v. Jackson*, 8 Cow. 406; *Birchhead v. Brown*, 5 Hill, 634

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and narrows the grounds of discussion to the following points:

1st. Whether the vessel and cargo, although literally American, according to the implied warranty in the policy had forfeited the privilege of that character, by accepting the protection of a passport from one of the belligerent nations?

2d. Whether the purchase of the cargo in a French port was within the prohibition of the act of Congress of the 18th June, 1798, and an illegal trade?

As to the first, it appears that the *Nancy* sailed with the usual documents of an American vessel, and was in every respect entitled to be considered as such, unless the French passport which she received at St. Domingo would deprive her of that privilege. The general rule by which to determine the national character of a vessel is the *domicil* of the owner. In the present case the owners resided in the state of Rhode Island. We admit the exception to this rule where the vessel navigates under the flag or assumed character of a country to which she does not belong; but the instance before us, we apprehend, is not the case of a vessel sailing under that protection, or, as it is termed by Sir *William Scott*, under the pass of a different nation; her papers were all American, except the one in question; she was in fact American, if we believe the verdict, and she professed no other than the American character. The additional paper which she received on board at the Cape, according to its import, was not inconsistent with that character; (a) on the contrary, she was therein stated to be the property of Mr. Jenks, merchant at Providence, state of Rhode Island; that paper, accompanied with the other documents she possessed, could not be evidence of her being French property, or employed as a French vessel; she had come from a French port, and was destined to a Dutch Island, both of which were lawful; and it was natural, and

(a) See *Blagge v. New York Ins. Co.*, post, 564.

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we believe is usual, in such cases, for vessels to seek for protection, and guard themselves against the cruisers of the power whose ports they have visited. This paper, unsupported by other evidence of belligerent property or employment, could be received in that light only. Connected with the fact that all *intercourse had been prohibited by our government at that period with the French nation, we think it afforded a reasonable ground of suspicion that she was employed in the service of the French, and perhaps the risk was thereby enhanced; but, so far as that fact was material, the prohibition was known to the underwriters before they subscribed the policy, and they must have estimated the increased danger, if any, that resulted from it. Of itself, we think, it would afford an additional security against one of the belligerent parties, (the French,) and could not alone be a cause of capture, or sufficient to authorize a detention by any other belligerent. In practice, we believe it is customary for vessels to endeavor to protect themselves, by papers of this description from the public agents of every nation from which they can be obtained, and they have been considered as affording security, instead of endangering their neutrality.^(a)

In determining the second question it is again necessary to recur to the facts found by the verdict. From them it appears that the vessel was compelled to put into the Cape in distress; that when there the cargo was landed for the purpose of repairing her; that nearly all the provisions were taken by the French government, which prohibited relading any part of the cargo, and permitted to barter what was left for the produce of the island only, and to dispose of it in no other way; if this be true, they had no alternative but to comply with the terms prescribed, or sacrifice the whole of their property. Their acts were acts of necessity and coercion, and the law of congress which sus-

(a) Therefore, a certificate of origin from a French consul, is no breach of the warranty of American property. *Le Roy v. United Ins. Co.*, 1 Johns. Rep. 343.

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pendent the commercial intercourse with France and her dependencies, cannot reasonably be construed to apply to a case of this description; its object was to prevent an intentional or voluntary traffic, and not to compel a sacrifice of property, or inflict a penalty in cases of distress or necessity. That would be a construction excessively severe, and contrary to the spirit and intent of the act. On this point we understand a similar decision has been made in the district court of this state, which, on appeal, was affirmed by Judge *Paterson* in the Circuit Court of the United States. We are, therefore, of opinion, on both points, that the plaintiffs are entitled to recover.^(a)

Judgment for the plaintiffs.

*M'GREGOR *against* LOVELAND. [*66]

THE SAME *against* ARNET.

THE SAME *against* THE SAME

1, after suit brought, the sum be reduced by a partial payment below 250 dollars, and a *cognovit* be taken for such residue, supreme court costs cannot be claimed.

Practice as to costs on a consolidation rule.

THIS was a question of practice submitted to the decision of the court on the following statement:

The above suits were brought on notes exceeding two hundred and fifty dollars each; afterwards a sum of money was paid, and security given by Loveland, the endorser, by which the amount was reduced below 250 dollars: *cognovits* were then given for the residue, by each defendant. It was understood at the time, by the defendant's attorney, that the judgments should carry supreme court costs. *Quere.* May not the clerk tax them accordingly?

(a) Judgment affirmed in the court of errors, (1 *Caines' Cas. in Error*, 47.) and in the supreme court of the United States, (3 *Cranch*, 219.)

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Per Curiam. No; the plaintiff should have taken his *cognovit*, and entered his judgment for a sum above 250 dollars,^(a) to entitle to supreme court costs; they cannot otherwise be allowed.

The following question was also submitted:

Several suits are consolidated by rule, on a policy of assurance; if the leading suit should recover more than 250 dollars, and the other suits less, will the party be entitled, by virtue of the consolidation rule, to supreme court cost on the suits that are under 250 dollars?

Per Curiam. We think not.

(a) On judgments by confession on warrants of attorney, and the condition of the obligation with interest on the sum actually due shall not exceed 50 dollars, no more costs shall be recovered against the defendant than 10 dollars. On such judgments in the common pleas, when no more than 25 dollars due, no costs from the defendant; when more, only 10 dollars. Laws of N. Y., vol 5, p. 116, sess. 30, c. 107. The judgment is said to be the criterion (in other cases) to determine, according to the rule of which court the costs are to be taxed. *Van Antwerp v. Ingersoll*, 2 Caines' Rep. 107. That judgment is not, however, the amount recovered, but the damages assessed, without even the six cents, or any other costs. *Van Horne v. Petrie*, ib. 213; *Seaman v. Baillie*, ibid, 214. But this rule does not apply in actions against attorneys, who are always liable to pay supreme court costs, (if the recovery be above 25 dollars,) though he must bring himself within the act "to reduce the laws concerning costs into one statute," (1 Rev. Laws, 528,) to obtain them. *Briley's case*, 1 Johns. Cas. 32. *Walsh and others v. Sackrider*, 7 Johns. Rep. 537. *Aliter*, when the recovery is under 25 dollars. *Moulton v. Hubbard*, 6 Johns. Rep. 332.

[1] See New York Code of Procedure, Title X.

Watsons v. Depeyster.

J. AND S. WATSON *against* DPEYSTER & Co.

If a suit be compromised between the parties, without the knowledge of the attorneys, and nothing said about costs, each party pays his own.

THIS and three other suits, were commenced against the above defendants and several others, on a policy of insurance on the brig Defiance, and a consolidation rule signed and entered. About a year afterwards, the defendants in the above suit compromised with the plaintiffs, who cancelled the policy as to them; of this the defendants' attorney had no information, nor was there any rule to discontinue, or other rule entered, and the other suits proceeded.

The principal cause *went on to trial, and the [*67] jury found a verdict for the defendants, which was acquiesced in. The defendants' attorney thereupon entered rules for judgment as in case of nonsuit in all the causes, pursuant to the consolidation rule, and the costs were taxed, and judgment rolls ready to be signed. It was now submitted to the court, on these facts, to decide whether the rules for judgment, and the judgment for costs as in case of nonsuit, were regular or not; or whether they ought to be set aside, as at the time of compromise nothing was said about the costs.

Hoffman, as *amicus curiae*, mentioned, that in *Wallace v. Lockwell* it had been decided, if a party compromise without knowledge of his attorney, each pays his own costs.

Per Curiam. In every suit each party is supposed to advance as his suit proceeds. If each has paid costs, and then they compromise, the suit is settled; for the transaction imports no further proceeding is to be had; nothing more than a simple discontinuance to enter on record, and nothing being said about costs, each must pay his own.

Hudson v. Henry.

The parties ought to have informed their attorneys there was a compromise.

Costs denied.(a)

HUDSON *against* HENRY.

Notice of motion for judgment as in case of nonsuit, sent by the mail, is not good notice; though such a service might save a default.

HENRY moved for judgment of nonsuit against the plaintiff for not proceeding to trial. Notice of the motion had been sent to the adverse attorney, by the mail; this was relied on as good service.

Per Curiam. The service is insufficient.(b)[1] A letter may miscarry, or the attorney may be absent when the mail arrives, or not immediately inquire for letters, though an affidavit of a plea sent by the mail might save a fault.(c) Let the defendant take nothing by his motion.(d) Motion refused.

(a) Where a suit is settled by the parties, without mentioning costs, each bears his own. *Johnston v. Brannan*, 5 Johns. Rep. 268. A settlement with the plaintiff of even the costs is valid, if made without notice from his attorney, and *bona fide*. *The People v. Hardenbergh*, 8 Johns. Rep. 335.

(b) For the modes of service, see *Caines' Prac.* 21, 45. In addition to which, it has been ruled, that service on the attorney, or his clerk, while in the office, though out of office hours, is good. *Cooper v. Carr*, 8 Johns. Rep. 360. So on an agent in Utica. *Chapman v. Raymond*, *ibid.* 360. But observe, on error from the common pleas, and no attorney employed, service must be on the defendant to join in error. *Clement v. Crossman*, *ibid.* 287.

(c) S. P. *Ludlow v. Heycraft*, 2 *Caines' Rep.* 386. And the plea will be presumed to have been received, unless the contrary be shown. *Stafford v. Cole & Spalding*, 1 Johns. Rep. 413. But if a trial has been lost, though *monita* be sworn to, the default will not be set aside without the judgment standing as security. *Fenton v. Garlick*, 7 Johns. Rep. 287.

(d) See *Cole and another vds. Stafford*, *Cole. Cas.* 107. *Boebe vds. Paddock*, *ibid.* 135.

[1] See New York Code of Procedure, secs. 408, 409, 410, 411, 412.

Manhattan Company v. Smith.

MANHATTAN COMPANY *against* SMITH, in custody.

To an application for a *supersedeas* for not having been charged on execution, within three months after judgment, it is a good answer, that the defendant has since been charged.

THIS was an application for a *supersedeas*, for not being charged in execution in due time, according to the act for the relief of debtors, with respect to the imprisonment of their persons.

The counsel for the plaintiff relied on *Brantingham's Case*, Cole. Cas. 42.

THE *COURT, without hearing any argument for [*68] the defendant, said, the authority cited was conclusive.(a)

LIVINGSTON, J., acquiesced; because it had been so decided, but confessed he did not believe the legislature intended the construction put upon the act by the court should ever be given to it. The rigor of the practice was, in his opinion, enough to condemn it, for he thought the neglect in the plaintiff ought to accrue to the advantage of the prisoner.

Supersedeas refused.

(a) *Western and Champlin v. Phelps*, 3 Johns. Rep. 446.

Steele vs. Tennent.

STEELE ET UX. at the suit of TENNENT.

STEELE, and FULLER, his bail, at the suit of TENNENT,
assignee of the Sheriff of Washington.

Attorney on being retained for a defendant, should examine state of proceedings; though it is but fair practice for plaintiff's attorney to disclose them; for want of doing so in a suit against bail, default and subsequent proceedings in original suit set aside on terms.

THE original suit was *trespass quare clausum fregit*, in which Steele and his wife had been held to bail under the statute.(a)

On the return of the writ the plaintiff obtained an assignment of the bail bond, upon which he issued process, filed his declaration on the first of October, 1802, and entered a default the eleventh of November; on the 17th the partner of the plaintiff's attorney received, when in his office, notice of the retainer of an attorney on behalf of the defendants in the bail bond suit, but no information was then given of any default having been entered. In January following final judgment was signed.

On the 8th of March, 1803, the attorney for the defendants in the bail bond suit was served with a notice of executing a writ of inquiry(b) in the original suit; a declaration also in the same suit was then delivered, which the plaintiff's attorney swore was merely to apprise the defendant of the nature of the demand; but the attorney of the defendant swore it was served absolutely, not on any condition, and that he did not know of the entry of the default in the bail bond suit, or that any declaration had been filed; that acting under that impression he did not attend the execution of the writ of inquiry, or apply to the court, last term.

On these facts the defendant now moved that the default

(a) 31st March, 1801, c. 102, s. 3.

(b) Under s. 16 of c. 90, of 31st March, 1801

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and interlocutory judgment in the original action, and all the proceedings in the bail bond suit, be set aside, and the defendants in the original cause let in to plead.

Per Curiam. The court are of opinion the defendant's attorney was in default. He ought to have seen that the proceedings *in the suit on the bail bond [*69] were regular. He should have called after the default and tendered costs. We do not say that the not disclosing the entry of the default in the suit against the bail amounts to a surprise, but it would have been rather more candid to have mentioned that circumstance. Let the judgment on the bail bond stand as security, and the costs on that remain also. The default and subsequent proceedings in the original suit to be set aside on payment of the costs of entering the judgment under the statute, and executing the writ of inquiry. The defendant to plead *instantly* to the declaration filed, take short notice of trial, and pay the costs of this application.

LIVINGSTON, J. I think the costs on the bail bond ought to be paid.

Motion as to setting aside default and proceedings on original suit.

Granted.

LOWRY against LAWRENCE.

The suing out the writ is the commencement of the suit, and cause of action must be antecedent; if it appear otherwise on the face of the pleadings it is fatal on special demurrer.

ON demurrer. The memorandum was:

"Be it remembered, that heretofore, to wit, on the third

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Tuesday of July, in July term, in the year of our Lord one thousand eight hundred and one, &c., came William Lowry, and brought into the said court, then there, his certain bill," &c.

The declaration was on a *bill of exchange* made in 1797, presented for acceptance on the first of October, 1801, and refused, of which notice was given to the defendant, who, on the 11th of October, promised.

To this the defendant demurred, and showed for cause, that, although the said declaration is entitled of the term of July, in the year of our Lord one thousand eight hundred and one, yet the said several promises and undertakings in the said declaration mentioned, are therein stated to have been made on the eleventh day of October, in the year last aforesaid, which is subsequent to the time of the exhibiting the *declaration* of the said William against the said Andrew, and for that it appears by the said *declaration* that the pretended causes of action therein specified had not, nor had either of them, accrued to the said William at the time of the exhibiting his said bill in manner aforesaid.

Troup, for the defendant, insisted that, by the [*70] practice of this court, the suing out the writ was *the commencement of the action; and if so, the declaration showed, on the face of it, no cause of action when the suit was commenced.

Ogden, for the plaintiff. It is contended on the part of the defendant that nothing appears on this record to warrant a judgment for the plaintiff.

By the course of the court the *filing* of the bill is the commencement of the action in a legal sense. (a)

The *latitat* is considered only as process.

The action is not deemed to be commenced until the bill

(a) *Johnson et al. v. Smith*, 2 Burr. 950. See Lord Mansfield's opinion, 961. *Foster v. Bonner*, Cowper, 454.

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is filed, though the real time of suing out the *latitat* is allowed to be shown, where it becomes material; as to prevent the running of the statute of limitations, &c. If such a necessity existed in this case, the actual time of suing out the first process might have been shown by plea. But where it does not exist the fiction of law will be preserved, and especially so when it is in furtherance of justice. On this occasion, the true question, therefore, is, when, in a legal or technical sense, was this action commenced? This can only be ascertained by showing the time of *filing the bill*. The time of filing the bill may be examined into to show the time of commencing the action. It ought to have been shown by pleading in this case. Not being shown, the court are at liberty to presume that it was after the cause of action accrued. The caption of the declaration is matter of fiction, and not conclusive upon either party. If it be conclusive, all actions by bill of privilege; actions against attorneys of the court; actions against absent or absconding debtors, giving security to appear to any declaration which may be filed by the petitioning creditor, would be defeated in all cases in which the cause of action accrued, during the vacation in which the declaration is filed. Because, in all these cases the declaration is entitled of the preceding term, and must necessarily be stated in the memorandum to have been brought into court of that term. This doctrine involves no hardship upon the defendant; because, if in the first instance process be issued before the cause of action accrued, a judge will discharge on common bail. So, if the bill be filed before cause of action accrued, the actual time of filing it may be shown and pleaded in abatement or in bar. In this case, it does not necessarily follow that the cause of action did not accrue before the commencement *of the [*71] action, and the time of that commencement not being shown, the court are at liberty, and ought, to presume it to have accrued afterwards.

In addition to this general reasoning on this subject, i

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may be observed that, in this instance, the real cause of action is stated to have accrued in 1797; being the date of the bill of exchange and long prior to the issuing of process. It is the assumption, founded on that undertaking, which is stated to have been made in October, 1801; and the time of the promise being wholly immaterial, the court will, in this circumstance, see an additional motive for adopting the principle contended for by the plaintiff.

Per Curiam. This case comes before the court on demurrer. It was an action of *assumpsit*, and the declaration captioned of July term, 1801. The time laid in the declaration, at which the cause of action arose, is on the 11th day of October, 1801. To this there is a special demurrer, alleging for cause, that the action appears from the declaration to have been commenced before cause of action arose. It is, we take it, well settled that if the plaintiff at the commencement of his suit had no cause of action, a subsequent right would not maintain his action. And it has been settled in this court, in the case of *Carpenter v. Butterfield*, that as to every material purpose, the issuing the writ(a) was the commencement of the suit; so that a note purchased by the defendant after that time, could not be set off against the plaintiff's demand.(b)

The declaration must be captioned of the term when the writ is returned served. This point is settled in the case of *Smith v. Muller*,(c) and it is there also determined that the plaintiff cannot recover any demand after the term when the writ is returnable, though before the declaration is actually filed. Justice Buller there says, according to the

(a) *S. P. Bird and others v. Caritat*, 1 Johns. Rep. 342, and not cured by a verdict. *Cheetham v. Lewis*, 3 Johns. Rep. 42.

(b) See *Crygier v. Long*, Cole. Cas. 103, that if defendant put in bail, and plead in chief, he cannot, after verdict, take advantage of the writ's being sued out before cause of action arose. If the arrest be before debt due, application ought to be to a judge, or the court, without putting in bail.

(c) 3 D. & E. 624.

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ancient practice the declaration was actually delivered the same term the writ was returned, and it was only in case of the plaintiff that the time of actual delivery was enlarged, but still it must be considered as delivered *nunc pro tunc*.

Upon the principles of these authorities, therefore, it must appear from the face of the declaration in this cause, and the court must necessarily intend the facts, that the writ was returned in July term, 1801, and of course the action, both in fact, and technically speaking, commenced previous to that *time. But the plaintiff alleges [*72] his cause of action to have arisen on the 11th of October thereafter. We think, therefore, it appears upon the face of the record that the action was commenced before the right of action accrued. The time of actually filing the declaration cannot, as contended by the plaintiff's counsel, be considered the commencement of the suit: if, therefore, the defendant, by plea, had put the fact in issue, it would have been an immaterial fact; all the material facts appear by the plaintiff's own showing. In the case of *Ward v. Honeywood*,^(a) the judgment was reversed on writ of error, on the ground that it appeared on the face of the record, that there was no cause of action when the suit was commenced. If this would be error after judgment, advantage may certainly be taken of it by demurrer.

We are, therefore, of opinion, that judgment ought to be for the defendant.

LIVINGSTON, J. In England it is settled, that the filing of a bill or declaration is to be regarded for every essential purpose as the commencement of a suit. Cowp. 454. But in *Carpenter* and *Butterfield*, decided by this court, a different rule was adopted. The issuing of a writ was there considered as the beginning of an action, so much so that the

(c) Doug. 61, that case was on marshalsea process, where the proceedings are by *plaint*; and in an inferior court the *plaint* is as an *original*. *Savage v. Knight*, Leon 302. See the observations of *Ashhurst J.*, in Doug. 62.

M'Neil's case.

defendant was not permitted to set off against the plaintiff's demand, a note which he had obtained for valuable consideration between the sealing of the process and the arrest. This rule, to operate fairly, must be mutual; if an action begins by issuing a writ so as to deprive the defendant of a set-off in the case mentioned, neither ought the plaintiffs to recover a demand not *then* due. *My* judgment, therefore, in favor of the defendant is not founded on British authorities, but entirely on a former decision of our own.^(a)[1]

Demurre allowed.

M'NEILL'S CASE.

The court will not pronounce judgment on a prisoner convicted of a conspiracy, if the record of his conviction is not before them, but will admit to bail.

THE prisoner had, together with two other persons, been convicted of a conspiracy at the last Oyer and Terminer for the city and county of New York, but had not appeared on his recognizance in time to receive sentence: he afterwards came in, and was now brought up, on his own petition, to have judgment pronounced; but the record [*73] of the conviction not being made up and brought into court, the bench said they had nothing before them on which to proceed; and, therefore, admitted him to bail.

(a) The principle of this decision is extended to justices' courts, in which the summons is held to be the commencement of the suit. *Boyce v. M'Neil*, 3 Caines' Rep. 133.

[1] See the New York Code of Procedure, sec. 99.

Anonymous—Brain v. Rodolicks.

ANONYMOUS.

Service of notice.

THE notice of motion in this cause was served on a person in the house of the attorney, and where he kept his office: but held not sufficient, as it ought to have been on a clerk in the office.(a)[1]

MOYLE against GILLINGHAM.

Service of notices on agents for non-enumerated motions.

NOTICE may be served, on an agent in town, on the first day of term, to show cause on the next day for non-enumerated motions; but then, it must be accompanied with a sufficient excuse for not having been for the first day.[2] If the excuse be received, the adverse party will have till next term to send into the country to his principal, for counter affidavits.(b)

(a) *Swartwout* ad: *Geleton*, Cels. Cas. 77. "The service must be on some person in the office, and belonging there; if nobody is there, it must be upon some one in the house where the attorney resides or the office is kept: and if nobody is there, it may be left in the office."

(b) The rule is, that a notice for any day in term is good, if shown why it was not for the first; but the motion will be heard only on a non-enumerated day. 2 Caines' Rep. 259. *Pinkard v. Ross*, 2 Johns. Rep. 186.

[1] See the New York Code of Procedure, sec. 409.

[2] See the New York Code of Procedure, secs. 402, 410, *et seq* Rule 36 of Supreme Court.

Brain v. Rodelicks.

BRAIN *against* RODELICKS & SHIVERS.

Commission to examine may be before issue joined. A rule for commission suspends the trial till the rule be vacated, or leave to proceed obtained; but if the defendant appear at the trial, and examine witnesses, it will be a waiver of the rule to vacate.

IN this cause it was necessary to examine a witness in the Havannah; and, as that port was open only to certain privileged vessels, in April, 1802, a rule for a commission was granted before issue joined, to prevent losing an opportunity of transmission which then presented itself. No return having been made, the cause was noticed for trial for the last sittings in March, 1803, when the defendant's attorney, seeing some witnesses in the court, whose absence, he feared, might delay the cause after the return of the commission, appeared and examined them; stating, however, the circumstances of his case, and that he begged to be considered as acting without prejudice to his future rights.

It was now moved, on behalf of the defendant, [*74] to set aside the *verdict, with costs; the plaintiff having proceeded to trial without vacating the rule for the commission.

Per Curiam. When a rule for a commission has been obtained, it suspends(a) the cause till, on application to the court, a *vacatur* be ordered and entered, or leave obtained to proceed to trial. But if the defendant appear and examine witnesses, it is a waiver of his commission, and the *vacatur* is unnecessary.[1] The motion must be refused.

Motion denied.(b)

(a) But notice of motion for judgment as in case of non-suit does not. *Brandt v. Burrows*, 3 Caines' Rep. 140. [See note (a) *ante*, p. 4.]

[1] See also *Webb v. Wilkie*, *post*, 153.

(b) A commission has been denied where the affidavit on which the application was made, did not state the cause to be at issue; and the marginal note is, that it will not be granted till after the cause is at issue. *Jackson*

 Codwise v. Hacker.

CODWISE, LUDLOW & Co. against HACKER.

When there are cross causes, and the plaintiff in each has obtained a verdict if material facts be omitted in a case made by defendant, and the papers from whence they may be inserted be in the hands of the plaintiff, the court will not order judgment to be entered, because cases have not been delivered, and though the cause has been noticed, but will give leave to amend and perfect.

Practice as to noticing cases.

THE plaintiffs, in the sittings of June, 1802, at New York as owners of a ship of which the defendant was captain, had, in an action against him for deviating from his orders, obtained a verdict, subject to the opinion of the court, on a case to be made; and he in a cross suit, had recovered against them a larger sum, subject to deductions, in case the opinion of the court should be against him as to certain items, charged and allowed by the jury.

A case was made on the part of the defendant to which the plaintiffs proposed amendments, which were adopted; the cause was then noticed for argument for the next October term, and also for January term following, in Albany. But it was then recollected that some material facts had been omitted, without which the case could not present the only important question in the cause. This was mentioned to the plaintiffs' attorney, who would not say whether he would consent to the amendments or not. The papers from whence they were to be drawn, and the case perfected, were in the hands of the plaintiffs' attorney in New York; so that the case could not be completed in Albany. No

ex dem. Atkins and others v. Bancroft, 3 Johns. Rep. 259. But it has been said that a commission is grantable at any time after suit instituted. *Concklin v. Hart*, Cole. Cas. 69. Perhaps the rule is, that regularly the application ought to be after issue, but if particular and good reasons be shown, it may be made before. *Anonymous*, 2 Caines' Rep. 259. *Hackley v. Patrick* 1 Johns. Rep. 478.

An issue of fact must be joined, or an interlocutory judgment obtained before a commission can be issued.

 Codwise v. Hacker.

application was made to a judge to correct the amendments. Nor had cases been delivered.

Hopkins now moved to set aside the original order to stay proceedings, that a case might be made, (a) and for leave to enter up judgment.

Riker resisted the application, because the case was imperfect, and the papers from whence only it could be completed were in the hands of the plaintiffs.

Per Curiam. We must deny the motion ; because, in the first place, there were cross verdicts to nearly the [*75] same *amounts. . . Secondly, the cases were never perfected, and it did not appear to be exclusively the fault of either. (b) Thirdly, the plaintiffs' attorney not having denied the omission of certain material facts, the court would presume they had appeared on the trial, and ought to be a part of the case. Let the case be perfected within 30 days. (c)

Hopkins prayed costs, insisting he had been regular. . .

Per Curiam. We consider that the plaintiff was irregular, in not answering, when applied to, whether he would receive amendments or not.

Motion denied.

THE COURT afterwards said, that where a defendant, after verdict, makes a case and notices for argument, if he does not appear at the time when called, judgment shall go

(a) See *Newkirk and wife v. Fox*, *Colo. Cas.* 122.

(b) See *Hun v. Brown*, *ante*, 23, n. (a).

(c) The time for making a case cannot be enlarged by a judge beyond the two days allowed by the rule of January, 1789, though he may that day propose amendments, or appearing before him. *Hornbeck v. Low*, *Colo. Cas.* 127. But this case is now overruled, and a judge may, in vacation, enlarge the time for making a case. *Black v. Brown*, 9 *Johns. Rep.* 264.

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but when the plaintiff notices a case made on the part of the defendant, and the plaintiff is not ready, it shall go down.(a)

KEMBLE vs. BOWNE.

In a policy on a vessel in a distant port from whence she is to sail, and stated to be there on a certain day, "at and from" mean the day on which she is mentioned to be there, and the policy takes effect from thence. It is not necessary to disclose how long a vessel has lain in port antecedent to the policy. The two per cent. deducted on a total loss, is, in case of disaster, a part of the *premium*.

THIS was an action on an open policy, 7,500 dollars, on the ship Helen, "at and from Port Petre, Guadaloupe, to St. Thomas's, beginning the adventure at, and from Guadaloupe, and to continue till her arrival at St. Thomas's and there safely moored," at a premium of 17 1/2 per cent. The policy was dated 3d September, 1800.

The Helen was a prize ship, and had been purchased for Charles Gobert, on the 20th November, 1799, whilst

(a) The practice as to noticing for argument, cases made, formerly was, that the party entitled to bring it on was required so to do in the next term, and on his neglect the opposite party was at liberty to notice. *Hoyt and Bennett v. Campbell*, Cole. Cas. 128. It has been since ruled, that either party may notice for argument, the right to bring it on at the next term being equal; therefore, if the party whose duty it is to make up the cases, and bring on the argument, be not ready to deliver them to the bench, when the cause is called on, upon the notice of the opposite side, judgment shall go against him. *Malcolm v. Bayard*, 1 Johns. Rep. 316. But when a case is noticed on both sides, and called on first, upon the notice of the party not bound to prepare the cases, it is presumed the practice has been, to wait till it be called on upon the notice of the party who is so bound, and has the right to open, and not to allow judgment against him, unless he be not then ready, and the other party is. A cause noticed and not brought on, must be retorted, as it will not be carried over to the next term, of course. *Livingston v. Rogers*, post, 427.

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lying at Point Petre, for 6,450 dollars and 48 cents, including commission for buying.

The defendant received no other information from the broker, than that the vessel was at Guadaloupe on the 28th of July, 1800.

The declaration contained an averment that the insurance was effected on account of Gobert.

The cause was tried before Mr. Justice *Livingston*, on the 9th of April, 1802.

It was admitted that a prior insurance had been made at St. Thomas's, on the same risk, for 6,400 dollars, on which Gobert had received 4,849 dollars and 35 cents, being the net sum after deducting premium and commissions.

[*76] *It appeared from the testimony of the captain, who took charge of the *Helen* on the 20th November, 1799, and continued to command her till the 6th February, 1800, that in that time he expended, in repairing and other necessities, 1,335 dollars and 86 cents, including an item for wages in taking care of the ship, to a period after he resigned the command; his knowledge of the payment, he said, was derived from the information of the persons employed in that duty: that the *Helen* was American built, copper bottomed, and would have been worth, in New York, with an American register, 25,000 dollars. During the time he remained on board, there were occasionally sugars and cotton put on board her, and taken out again to load other vessels at that place, belonging to Mr. Gobert.

From another witness it appeared, that being at Guadaloupe, in July, 1800, he received orders from Gobert's agent at St. Thomas's, to take possession of the *Helen*, man, victual her and send her to him there. That according to an account of one Brocha, Gobert's agent, "the purchase-money, unrigging and tarring, safe mooring and guarding the ship, while at Guadaloupe, amounted to 7,000 dollars. The witness paid Brocha 3,000 dollars, part of the purchase-money, and Brocha told him Gobert paid him

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4,000 dollars." That some expenditures were made upon the ship before the witness took possession of her, to the amount of which he could not speak. But the bill of disbursements for the ship, "paid by him for repairs and necessities to get her despatched on the voyage from Point Petre to St. Thomas's, was 4,461 dollars and 87 cents," amounting in the whole to 7,461 dollars and 87 cents, paid by him.

The ship sailed from St. Thomas's some time in September; the witness was a passenger; on the voyage she was captured, carried into Antigua, and condemned as prize; a claim had been interposed, in the prosecution of which, 817 pounds 11 shillings and 8 1-2 pence, was expended. The proportion of this to be borne by the ship was admitted to be about 500 dollars.

Mr. Farrers, an insurance broker of great eminence, said it was usual, in estimating the value of the ship, to allow wages advanced *to the captain and crew, [*77] (commonly a month's pay,) as part of the outfit of a vessel; also provisions for the voyage, and all other charges for things requisite and proper to prepare her for the voyage insured. That no expenditures whatever, previous to the commencement of the voyage, are charges against the insurers on freight. That some of the items in the accounts, in his opinion, and according to his practice, required vouchers, or it could not be known whether they were proper or not. That in settling losses in such cases, vouchers were required by him.

It was admitted that nine livres make one dollar.

The judge, in charging the jury, stated, as the inclination of his opinion, that the policy could not be considered as attaching from the first purchase of the ship by Gobert, at Guadaloupe, but from the time some act was done towards equipping for the voyage. Whether, however, this was the case or not, and even to suppose it to have attached at the time of such first purchase, that it was not necessary to disclose to the underwriters the length of time the vessel

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had remained at Guadaloupe, nor that she had been used as a storeship at that place. He was of opinion that the account of the first witness ought to be laid out of the question; yet, however, independently of that, there appeared to be interest to the amount insured in this policy, beyond the prior insurance.

The jury found for the plaintiff a total loss, without going from the bar, or examining the accounts.

An application was now made to set aside the verdict, as being contrary to law and evidence, and grant a new trial.

Pendleton, for the defendant, made two points: first, that the policy was void for concealment; secondly, that allowing it to be otherwise, the verdict could not stand, being against evidence in finding a total loss when only a partial injury had been sustained. On the first point he observed, that a contract must be taken as it is worded where there is no ambiguity, or it is no contract at all. In policies of assurance "at and from" a place, means first arrival at that place. *Park*, 38,(a) and the cases cited by Lord *Hardwicke*, in *Mottetux v. London Assurance Company*, 1 Atk. 548. It is true that the construction is not universally the same. In France it is interpreted to be from the time of sailing. 2 Emer. 14. But in England it is regulated by special contract. 1 Marsh. 173. *Bird v. Appleton*, 1 [*78] *Marsh. 60. That "at and from" mean from the first arrival, is obvious from the words themselves, and the two first cited authorities. If not so, when did the risk commence? The judge's opinion would make a new contract. It would be from beginning to equip for this voyage. But how is this to be ascertained? The accounts of expenditure are without dates: they can show nothing, and this very circumstance is enough to throw aside any other interpretation than the one contended for; because

(a) *Leigh v. Mather*.

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if the commencement of the risk be not mentioned, the policy is void. 1 Marsh. 182. If this be so, then there was a material concealment in not disclosing the vessel's having lain nine months at Guadaloupe, and used during that time as a storeship, or the stay was a deviation. On the point of concealment, it is settled that every fact not disclosed, which would increase the risk, is material and vacates the policy. 1 Marsh. 354. The difference of premium is decisive on the importance of communicating her stay. At St. Thomas's it was 30 per cent.; here 17 1-2. To prove that concealing the length of stay would vacate the policy, he relied on *Hodgson v. Richardson*, 1 Black. 463. The stay would deteriorate the vessel, and increase the hazard; it was, therefore, a material fact to be disclosed, and if so, whether the loss was occasioned by the fact concealed or not, was perfectly immaterial. *Fillis v. Bruton*, Park, 182. *Seaman v. Fonnereau*, 2 Str. 1188. But allowing the verdict not to be void, the plaintiffs are not entitled to a total loss; the amount insured was . . . 7,500 dollars, the first cost of the vessel was, including the commissions and necessary disbursements, but throwing out the month's wages and charges previous to the policy . . . } 5,688 dollars, so that the whole cannot be due.

Hamilton, contra. In this case the situation and circumstances of the vessel antecedent to the orders for insurance were perfectly immaterial, and, therefore, needed not to have been disclosed. The only effect which the Helen's stay at Guadaloupe could have had, would have been to render her less fit for the voyage insured. That she was completely adequate to its performance, was a warranty implied in this as in every other policy. It is a settled principle, that whatever is warranted against, whether it be in express terms, or by implication, need not be dis

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closed,^(a) and the reason is obvious, because it is [*79] *a risk the assured takes on himself. Though the construction given to the words "at, and from" could not be totally denied, it could not be universally acceded to. The interpretation relied on was applicable only to those cases of insurance where a vessel was insured at and from a port *to which she was going*: but when the terms in question were used in reference to a vessel in a distant port, *from whence* the voyage insured was to have its inception, the expression could mean only from the time some act was done towards equipping for the voyage intended; at the utmost, it could not relate back farther than to the orders for insurance. But as the voyage might, even after the orders given, be in fact deserted, it would, perhaps, be the safest interpretation, to say the policy should never attach but on some overt act indicative of carrying it into execution. On the other point, the accounts and the testimony on which they were founded, were before the court, and carried their propriety, or impropriety on their face.

Per Curiam. Two questions are made in this cause.

1. Was every proper information given to the underwriters?
2. Were the charges proper and sufficiently proved?

On the first, no doubt was entertained at the trial, nor is any now. It was not necessary to disclose how long the Helen had been at Guadaloupe, nor that she was a prize ship. The first could be material only in case her being there antecedent to the insurance had enhanced the risk, and the latter, in case of a warranty, or representation, which negatived her being a ship of that description. It is of no importance how long she had been at Guadaloupe, unless the policy attached from the moment of her arrival there, although it might have been several years before it was effected. The construction contended for would be

(a) But though what is impliedly warranted against need not be disclosed, questions relating to it must be answered truly.

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unnatural. In a case like this, when a vessel has been long in port, previous to an insurance, the risk does not commence till some act be done towards equipping her for the voyage, or on the day on which she is stated, as here, to have been in safety in the port from which she was to sail; this was the 28th of July, 1800. If she had been lost or injured before that day, the underwriters would not have been liable. When she is stated to have been at Guadeloupe(a) on a certain day, it must mean that she was there in safety,(b) and that no preceding accident was to be made good by the assurers; it cannot, therefore, be material *where she was prior to that day, for the parties, by agreement, have ascertained that the risk shall commence on the 28th July, 1800. [*80]

The other question relates to the value of the vessel. In forming this valuation, there were added to the first cost sundry charges, on the propriety of which we are now to determine. On the trial one account was rejected, and we still think those charges improper, because they accrued prior to the 6th of February, 1800, five months before the policy attached; but principally because they are, with hardly any exception, of such natures as to have been occasioned solely by her stay at Guadeloupe, and such as

(a) The rule in England is, that when the words "at and from" are in a policy effected on a vessel then and before in port, the risk begins from the subscribing; when on a vessel expected to arrive at a certain place, but at which she has not arrived, the risk commences on the first arrival. Neither of these principles, it is evident, would govern here.

(b) If an insurance be "at and from" a foreign port, where a vessel then is, in the course of her voyage home, the policy attaches if she be in physical safety, though she may be in political danger. *Bell v. Bell*, 2 Camp. 475. But if she arrives a wreck, and has never been once in safety, it does not. *Parmeter v. Cousins*, *Id.* 235. But there is a degree of seaworthiness commensurate to the risk, which gives the technical safety required to render the policy effectual; for a vessel may be seaworthy under the word "at," while undergoing repairs, and when she would not be seaworthy "from" her port on the voyage, (*Forbes and another v. Pilson*, Park, 6th ed., p. 299, n. a, and the cases there,) though the policy be on her "at and from" her original port of departure. See also *Garrigues v. Coaz*, 1 Binney, 594.

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gave no permanent value to the vessel. They consist (except one anchor) of provisions, which must have been consumed while the vessel was used as a storeship, and of wages and other disbursements, which become necessary by such stay, and ought not to swell the computation when we are ascertaining her worth.

To the other account it is objected that the *items* are neither proper nor well proved. As to the proof, the witness says, "The bill of disbursements for the ship paid by him for repairs and necessaries to get the ship despatched on the voyage from Point Petre to St. Thomas's, amounted to 4,461 dollars, as per account (A) annexed." There is nothing of hearsay in this; he paid the money himself, and states on what account. What he heard related only to the purchase money, not to what was paid for repairs; it is true there is no date to this account, but it is a fair deduction, from the deposition of Davis, that all these expenses were incurred after he took possession of her, which was in July, 1800: for he expressly states, that he cannot say what expenditures took place *before the vessel came to his hands*. The propriety of many of these charges against an underwriter on the vessel is also denied. If these be deducted, there will still remain a sum large enough to entitle the plaintiff to retain his verdict. It is admitted that in estimating the value of a vessel, it is usual to allow a month's pay advanced to the captain and crew, provisions for the voyage, and all other charges for articles necessary to prepare her for it. The counsel will be furnished with an estimate of the court according to this opinion, in which the deductions must be regarded as liberal as they respect the underwriters.

[*81] *Upon the whole, we are satisfied that the first cost of the vessel, and the expenses of such repairs and outfits as are properly chargeable against the underwriters on her, are fully equal to the sums covered by the

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two policies, and that therefore, a new trial ought not to be granted.

New trial refused.

By a statement which was read, as forming a part of the opinion of the court, the value of the *Helen* was thus estimated.(a)

	<i>Dollars.</i>
The <i>Helen</i> cost	6,450 48
There was received on a prior policy	4,849 35
<hr/>	
This leaves of her first cost for this policy	2,101 13
To this must be added the following <i>Livres.</i> <i>Dollars.</i>	
items of the account (A):	
The hire of sundry hands for rigging	
and ballasting, &c.	7,020
Old cordage	360
Do. 630, an anchor, 540,	1,170
†Plank, 81, carpenters, 540,	1,421
Beef and pork, 864, cable, 2,070,	2,934
Cordage bought at vendue	1,440
Caulking the long boat	180
Bill for plank	74
Blacksmith's bill, 474, caulker's, 756	1,230
Two bills for crockery for cabin, 540, and	
198	738
Paid for a boat	576
†A topgallant-sail and some others	2,142
Two spars, 389, cooper, 270	657
Shipchandler	2,994

(a) The value of a ship is what she may be worth at the time of sailing on the voyage insured, including repairs, value of her furniture, provisions and stores, money advanced to the sailors, and every expense of outfit, adding the premium of insurance. Marsh. 623, last ed. Agreeably to the above rule the estimate in the case was made, which, in order to be as explicit on this subject as possible, is inserted at length.

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Carpenter's bill, water, &c. . . .	594
Wages to captain, &c., advanced . .	3,672
	<hr/>
	27,202
Commissions at 5 per cent.	1,861
9 livres — to one dollar	<hr/>
	3,173 00
[*82] *Add also premium of insurance on	
second policy for dollars 7,500 . .	1,812 50
Commissions on do. at 5 per cent. . .	65 62
Expenses of reclaiming her after capture .	200 00
	<hr/>
	6,852 25
A mistake in adding the items marked † .	44 00
Interest as usual on this sum after deduct-	
ing 2 per cent.	187 93
	<hr/>
	6,758 32

The two per cent., which, by contract of the parties, are to be deducted in case of loss, we regard as part of the consideration for the insurance, or as so much additional premium in the event of a disaster. To add it, therefore, to the valuation would be a violation of this agreement. The passages referred to in *Wesket* only show how an insurance ought to be made to be completely covered, not that two per cent. of the value shall not be retained where it is so stipulated. He admits this was formerly the practice in England, but the policies there do not now contain this clause: on the whole, we think two per cent. must be deducted from the preceding valuation and interest calculated on the balance, to wit, on the sum of dollars 6,758 32.

Mistake of dollars 88 88 in the item marked † makes the true sum dollars 6,669 44.

Jackson v. Hubbard.

JACKSON, *ex dem.* POTTER and others, *against* HUBBARD.

Under the act of the 8th January, 1794, for registering deeds of military lands, &c., a prior deed not deposited in the clerk's office is void against a subsequent purchaser, for a *bona fide* consideration, whose deed is deposited.

EJECTMENT to recover lot No. 49, in Tully, in the county of Onondaga.

From the case made, and submitted to the court, without argument, it appeared that the lessors of the plaintiff and the defendant derived title from the same patentee; and the only question was, whether, under the act of the 8th of January, 1794, for registering deeds and conveyances relating to military bounty lands, the deed, under which the defendant held, though subsequent in date to that by which the lessors of the plaintiff claimed, but *first* deposited with the clerk in Albany, should be preferred to that of the lessors, which had, before the passing of the act, been recorded in the Secretary's office, but was not deposited with the clerk in Albany, till after the deposition with him, of that by virtue of which the defendant was in possession.

**Per Curiam.* Both parties are fair purchasers [*83] of a lot of military bounty land. The deed under which the lessor of the plaintiff claims is prior in date, and was on record in the secretary's office previous to the passing of the act requiring all such deeds by a certain day to be *deposited* with the clerk of the county of Albany, and declaring such as should not be deposited, void as to subsequent purchasers, for valuable consideration, who should so deposit their deeds. The defendant's deed was so deposited. The deed from the first purchaser to the lessor of the plaintiff, together with the power of attorney under which it was executed, was also duly deposited, agreeable

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to the act; and the question which the parties have made is, whether such recording in the secretary's office is [*84] to be considered as notice, and thus satisfying the principal object of the act. We think it does not. It was not the design of the legislature to direct a mere registry of such deeds for the purpose of enabling the purchasers to examine a fair deduction of title. But the object of the act declared to be, is, the prevention of frauds, by facilitating the means of discovering forgeries. Now the examination of a mere record could not conduce to this end. Nothing short of an inspection of the original would, in many cases, answer the purpose; particularly where the forgery consisted in antedating the deed; and this species of forgery, we may infer from the act, which particularly alludes to it, was probably the most frequent.

We are of opinion, that

Judgment be for the defendant.(a)

VANDYCK against VAN BEUREN and VOSBURG.

Where a conveyance might have been claimed, and possession has gone with the right to claim, a deed will, after 50 years, be presumed. A sole possession under claim of right for forty years by one tenant in common amounts to an ouster. The word "desire" in a will raises a trust, where the objects of that desire are specified.

THIS was an action of trespass *quare clausum fregit*, for

(a) A title under a deed of 1795, not proved and recorded till 1807, was defeated by a deed of 1804, but duly recorded in 1806. *Jackson v. Given and others*, 8 Johns. Rep. 137.

As to ouster and adverse possession as between tenants in common, see *Buller v. Phelps*, 17 Wend. 642; *Jackson v. Tibbits*, 9 Cow. 241; *Jackson v. Whitteck*, 6 Cow. 632. See also, as to presumption of grants, *Jackson v. Miller*, 6 Wend. 228; *Moore v. Jackson*, 4 Wend. 58; *Jackson v. Russell*, 4 Wend. 453; *Jackson v. Vincent*, 4 Wend. 633; *Doe v. Walter*, 8 Wend. 109; *Bohambur v. Jackson*, 2 Wend. 13; *Jackson v. Mancius*, 2 Wend. 357.

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entering and cutting wood in five several lots, in De Bruyn's patent, in the county of Columbia. The plea was, not guilty, with notice that the defendants were tenants in common of the *loci in quibus*, and were seised in fee of a ninth part thereof. The cause had been first tried before Lewis, Ch. J., at a *circuit court* in Columbia county, on the 25th June, 1800. The facts were briefly these:

Stephanus Van Alen, by his will of the 17th May, 1740, devised *inter alia*, as follows: "*Item*. I give and bequeath unto my sons Cornelius, Jacobus, and Ephraim, all my land, or share that I have in the patent called the Bruyn's patent, lying within the bounds of Kinderhook patent, with all the privileges, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, unto them my said sons Cornelius, &c., and to their heirs and assigns for ever, each one equal third part thereof, the whole into three equal parts to be divided, *with a proviso and restriction*, that they, my said sons Cornelius, &c., do pay, or cause to be paid therefor, unto my daughters Hyletje, Elbertie, Jannettie, Christina, my granddaughter Maria,(a) and their *respective heirs and assigns, each the just [*85] and full sum of 12 pounds and 10 shillings, current money, within the time and space of six years next after my wife's decease or remarriage, in six even distinct payments, every year, to each the just and equal sixth part of the said 12 pounds 10 shillings aforesaid.

"I *desire*(b) my three sons Cornelius, Jacobus, and

(a) She was the daughter of the testator's eldest son, Lawrence.

(b) Where the *property* and the *person*, or object of the bounty, are designated, a specific form of words is not necessary to create a trust. Therefore, "will and desire; desire and request; desire; it is my dying request;" raise a trust. *Vernon v. Vernon*, Amb. 4; *Nowlan v. Nelligan*, 1 Bro. C. R. 489; *Pierson v. Garnet*, 2 Bro. C. R. 38, 226. So "hoping." *Richardson v. Chapman*, 5 Bro. P. R. 400. So "not doubting." *Massey v. Sherman*, Amb. 520; *Wynne v. Hawkins*, 1 Bro. C. R. 179. So "recommend," where the testator may command. *Malim v. Keighly*, 2 Ves. jun. 333; *The Attorney-General v. Davis*, 9 Ves. jun. 544. See *ibid* 319, *et seq.* So if the persons intended be so described that the law can ascertain them, though not speci-

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Ephraim, that in case any of my *daughters* above mentioned should be inclined to purchase of them the land in the Bruyn's patent, (here above bequeathed to them) for a living for herself and family, that then they let such of my daughters have it at the same price they had it for."

Jacobus and Ephraim died without issue: Cornelius left a son, Stephen, who had a son, Cornelius, each of which sons was the eldest in succession.

In 1752, a division of the lands in Bruyn's patent was laid out, by one Bleeker, and from that time to the time of bringing of the action, possession was proved by the plaintiffs in themselves and those under whom they claimed from Hyletje, the first possessor, who intermarried with Arent Van Dyck.

The plaintiffs, in support of their action, offered proof of an application from Hyletje to Cornelius Van Alen for the purchase of the lands in question, and also a release and quitclaim from Stephanus Van Dyck, son and heir of Hyletje and Arent, to the plaintiffs then in possession.

The judge refused to admit, either the one or the other.

The defendants claimed under a conveyance by lease and release from Maria, the granddaughter, who had married one Herkemer; but had constantly resided out

scally named, as, "relations, kindred." Because the statute of distributions enumerates those held in law to be beneficially related. *Hardinge v. Glyn*, 1 Atk 468, and the cases there. *Palmer v. Scrib*, 8 Vin. Abr. 289. So "descendants," for they mean heirs. *Crosley v. Clare*, Amb. 391. So "descendants living near a place." Ibid. But "all descendants" is too general. So is "continuing the bequest in the family." *Harland v. Frigg*, 1 Bro. C. R. 142. So when the bequest is "of what shall be left" after a devise. *Passmore v. Tiltier*, 3 Ves. jun. 1. Later decisions have given to the word "family" the same construction as "relations." *Crawley v. Osborn*, 5 Ves. jun. 319. In *McLough v. Baron*, 5 Ves. jun. 159, it was thought they might include a husband or wife. But at law, a devise in mortem, by the word "family" was held void for uncertainty. *Doe v. Jefferies*, 3 East, 172. It would be injustice to the reader not to refer him to Mr. Finch's note to *Edes v. Fitzgerald*, Pre. Ch. 200, 201.

Baynes v. Tates, 9 Mod 122, and *Cushy v. Cushy*, so far as they are contrary to the above decisions are not law.

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of the limits of the United *States, and after the [*86] death of her husband made the conveyance relied on. The admission of this conveyance, as testimony, was resisted by the plaintiffs' counsel on three grounds:

1st. That the plaintiffs had given sufficient evidence of absolute exclusive possession of the premises pretended to be conveyed to the defendants; 2dly. That this possession amounted to an actual ouster, even upon the supposition that a tenancy in common was created by the said will; 3dly. That supposing Maria Herkemer could be considered as a tenant in common, yet she had only a right of entry which is not assignable, and this being the case, it contravened the statute made to prevent maintenance.

The objections were overruled.

No evidence was given of the payment of the sum of 12*l.* 10*s.* to any of the daughters, or to Maria.

The judge charged the law to be in favor of the defendants, in consequence of which a verdict was given for them.

On a motion for a new trial in April term, 1801, it was so ordered; and the cause being heard before Mr. Justice *Radcliff*, on the 6th of October, 1801, a verdict was, on his charge, rendered for the plaintiffs.

A motion was made to set aside this also, and grant a new trial.

The facts were substantially the same as in the former cause, and the additional circumstances are noticed in the decision of the court, which was now delivered, the cause having been argued at a former term.

Per Curiam. On the trial it was proved by the plaintiffs that they did then, and for about twenty years preceding, had lived on De Bruyn's patent; that they had a house and orchard and 28 acres adjoining the same, as early as 20 years preceding, and that they held other parcels of land; that the patent was divided, in 1793, and the plaintiffs then took actual possession of the *loci in quibus*, which were uncleared wood lots, and that the defendants had cut wood

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in some of them; that in 1796, the plaintiffs had leased parts of the lots contained in the declaration; that the plaintiffs claimed the whole of the lands in De Bruyn's patent, under the will of Stephanus Van Alen; that their mother was Hyletje, a daughter of Stephanus Van Alen; that in 1751, or in 1752, she lived where the plaintiffs now do on the patent, and the plaintiffs then lived with her; that the land near the house was then cleared; that Hyletje died in 1767, and other parcels were cleared by that time, or at least by 1772; that one piece was cleared in 1761, and then in possession of the plaintiffs; that Stephen Van Alen, the testator, had a son Cornelius who had a son Stephen, who had a son Cornelius, each of whom was the eldest son in succession.

On the part of the defendants, the will of Stephanus Van Alen was produced, bearing date the 17th of May, 1740. It was proved that the testator left three sons, and that two of them died above fifty years ago without issue; that Maria was the daughter of Lawrence, the eldest son of Stephanus, and who died in the lifetime of his father; that Maria married, at the age of 20, one Herkemer, and in 1776 or 1777 went to Canada to her husband; that her husband died in 1795, and that ever since she resided in Canada. The defendants then offered a deed to them from Maria Herkemer, dated January 8, 1800, but this was overruled; that the defendants further proved, that in 1799, the son of Maria Herkemer offered the premises for sale to the plaintiffs for 100*l*; that the plaintiffs offered a price, but no bargain was concluded; that a few days after, one of the plaintiffs admitted that Maria Herkemer was heir to one ninth of his land, the deed was then offered again, and rejected; the defendants further proved, that in 1751 or 1752, on a division of part of De Bruyn's patent, and which was after the death of Stephanus, his eldest son Cornelius acted as agent for the share of Stephanus, and claimed, besides his own share under his father's will, one third of the two shares of his two brothers who were dead;

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that Henry Van Dyck claimed a ninth part of the patent, and that Hyletje, and the plaintiffs after her, claimed the whole share of Stephanus; that about that time Cornelius took possession of part, and paid four ninths of the costs of an ejectment suit in defending the land, and that the plaintiffs paid five ninths of the costs; that on the division of the patent, in 1798, the share of Stephanus was designated as laid out for his representatives. It was further proved that the plaintiffs had offered 100*l.* for Maria Herkemer's share, and one of the plaintiffs said Maria had a right to money, and not land by the will; that at another time (about 4 years ago) one of the plaintiffs confessed he meant to buy a part of the premises of *Mrs. [*88] Herkemer; that Cornelius Van Alen, the son of Stephen, who was the son of Cornelius, had for many years uninterruptedly cut wood in several of the lots mentioned in the narration, and that as well before as since the division in 1798; and that he, for several years past, had in possession, and still has, two pieces of land in the land allotted to the share of Stephanus Van Alen: the deed of Mrs. Herkemer was again offered and refused, and a verdict taken for the plaintiffs.

It appears by the will of Stephanus Van Allen,^(a) referred to in the case, that he gave to his "three sons, to wit, Cornelius, Jacobus and Ephraim, and their heirs, *all his lands or share in the De Bruyn's patent*, each an equal third part, with a proviso or restriction that they should pay to his daughters Hyletje, Elbertie, Jannettie and Christina, and to his granddaughter Maria, (daughter of his deceased son Lawrence,) each 12*l.* 10*s.* in six equal payments: and that if any of the said children, or the grandchild, should die under age, or without issue, the portion of such child or grandchild to be divided equally among the survivors:" the testator further desired his said three sons, "that in case any of his said daughters should be inclined to purchase

(a) He claimed one-ninth of the patent, amounting to 900 acres, chiefly pine land.

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of them the land in De Bruyn's patent for a living for herself and family, that then they let such of his daughters have it at the same price they had it for."

This controversy, upon a statement of facts substantially the same with that in the present case, was formerly brought into view before this court, and received a decision in April term, 1801. It came before the court upon a motion for a new trial for misdirection of the judge, who had charged the jury that the law was with the defendants, and who had admitted the deed of Maria Herkemer. A new trial was awarded by the court, and it is in consequence of such new trial that the present application is made.

In the former case it appeared that the plaintiffs claimed the *loci in quibus* as sons of Hyletje, the eldest daughter of Stephanus Van Alen; that the defendants claimed under the recent deed of the widow Herkemer, and that her right arose under the will, she having survived the two [*89] sons of the testator, *both of whom had died without issue 55 years before the trial, when her right accrued, and that she claimed an undivided sixth part of two third parts of the testator's interest in the patent.

The Court then decided,

1. That a deed from Cornelius to his sister Hyletje might be presumed from her entry fifty years before, and uninterrupted possession in her children since, *according to the nature and situation of the land*; and that this presumption was the more readily to be made since she had a right by the will to claim a deed, and had intimated her wish accordingly.(a)

2. That if this was not so, yet that the deed of the widow Herkemer was void, for she being out of possession, and no demand or claim by her husband or her for forty-two years after she came of age, the jury ought to have been directed to *presume an custer*, and that if ousted, she could not convey.(b) The case in 1 Leon. 166.(c) was referred

(a) 3 Durnf. 155, 159.

(b) Cowp. 217.

(c) *Slyright & Page's case*

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to as proving that a *feme covert*, whilst *feme covert*, might be disseised, so as to render her deed before re-entry maintenance. The first inquiry that naturally arises in this case is, whether there be any change in the facts sufficient to change the conclusions of law that were drawn in the former case?

1. With respect to the presumption that Hyletje received a deed from her brother Cornelius, the same facts are here to warrant it.

It appears that by the will of her father, an election was given to any of the daughters to purchase the premises, and a trust was raised in the will for that purpose; that Hyletje entered upon the premises with her children as early as 1751, or 1752, and after her father's death, and claimed the whole share of Stephanus; that she continued in possession till her death in 1767, and that her sons have remained in possession of the *loci in quibus* down to the present day, and have also claimed the whole share of the testator; that this entry and possession of Hyletje must have been with the knowledge and assent of the other children, and have passed under their eye, for it appears that on the division of the patent in 1751, or 1752, Cornelius, the son of the testator, was present and claimed the whole of his father's share, and took possession of part; that this possession must soon thereafter have been abandoned, since we find within the same year Hyletje in possession, *and this claim must soon thereafter have ceased, [*90] since we hear no more of it, and the claim of Hyletje remained sanctioned by possession; that the possession was such as the subject was susceptible of, it being understood that a large part of the premises was uncleared pine land, and from all these circumstances there arises a strong and unshaken presumption of right. A deed is justly, if not necessarily, to be presumed, and considerations of public convenience and sound policy will, under such circumstances of ancient and continued possession by colour and

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claim of right, require the presumption,(a) We are therefore, clearly of opinion, that the decision in the former case

(a) Where the possession is old, and has gone according to the right set up, a deed necessary to the title will be presumed. *Anon.* 1 Vent. 257. *Warren v. Greenville*, 2 Stra. 1129. But when the possession is not ancient, and shown to be against the right claimed, a deed will not be presumed. *Goodtitle v. Duke of Chandos*, 2 Burr. 1065. Thus, if a surrender 200 years ago be shown, yet after a subsequent possession of 150 years under a rent stated in a parliamentary survey as freehold, a grant will be presumed even against the crown. *Roe v. Ireland*, 11 East, 280. So on a possession of crown lands, commencing by encroachment 55 years ago, if it be continued down within 7 years, a grant will be presumed, unless it appear that by statute, or otherwise, the crown could not grant. *Goodtitle v. Baldwin*, 11 East, 498. So after an abandonment of premises by a tenant, and 14 years' possession, under a lessor who was entitled to enter on non-payment of rent, a re-entry will be presumed. *Jackson v. Demarest*, 2 Caines' Rep. 382. But the non-payment of rent for nine years was held not to furnish evidence to make such a presumption. *Jackson v. Walsh*, 3 Johns. Rep. 226. The class of cases above referred to, seems to be no more than deductions from the rule of law, by which all things done are presumed to be legally done, unless the contrary appear; as that an apprentice deed, which was acted upon, shall, after a lapse of 30 years, be presumed to have been regularly stamped, though there be not any memorandum of such a stamp in the entries of the stamp office; (*The King v. Long Buckby*, 7 East, 45;) but where a right has not been acted upon, it shall, after a lapse of perhaps 20 years unaccounted for, be presumed to be extinct. Therefore, if in ejectment an outstanding title in a stranger be relied on, the defendant must show it to be a subsisting title under which possession has been had within 20 years, or it will be presumed to have been extinguished. *Jackson v. Hudson*, 3 Johns. Rep. 375. There is another class of cases, influenced by the doctrine of presumptions, arising from the rule, that all things which ought to have been done shall be presumed to have been done, unless, &c. Therefore, where the plaintiff showed title in his lessor under a devise to trustees, with directions to convey the estate in fee to the lessor at 21, and that he had attained that age, a conveyance from the trustees was presumed. *England v. Slade*, 4 D & R. 682. But as the law never presumes a wrong, (see *Williams v. East India Company*, 3 East, 192,) a deed will not be presumed in violation of a trust, or even in favor of a possible breach, as where the trust is doubtful. *Keene v. Dearborn et al.*, 8 East, 248. A further rule to be attended to, in regard to presumptions is, there must be some fact in consequence of, and in harmony with which the presumption may be made. Thus, if an alien enemy come into a country in time of war, and continues there without disturbance, a license shall be presumed. *Maria v. Hall*, 1 Taun. 37, (note.) So if a *feme covert* has for several years received the rents of her separate estate, an au

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applies and governs the present one on the first point, and that the verdict is right and ought to stand, whatever may be our opinion as to the legal operation of the deed of Mrs. Herkemer. But,

2. We think that we are also bound by the former decision to consider the deed of Mrs. Herkemer as void, and that the same facts are stated in this case to lead to the same result. Her right, under the will, and upon the death of her two brothers, had accrued upwards of fifty years before the trial. Concurrently with the commencement of her right, Hyletje had entered under a claim to the whole share of her father, and under a right to elect and demand a deed for the same. This entry and enjoyment of the premises must have been adverse to the claim of her niece; and her possession, continued down in her and her sons, had every appearance of an exclusive and independent possession. One strong mark of exclusive ownership was the extension of the clearings from time to time, and this in pursuance of a claim to the whole share of the testator made by Hyletje and her sons. It does not appear that from the time of the commencement of the right of Mrs. Herkemer down to the date of her deed in 1800, a period of about fifty years, that she ever asserted her right, or received or claimed any share in the profits of the premises, and that an adverse claim of possession was constantly before her. These facts undoubtedly amount to an ouster

thority from her husband will be intended. *Doe v. Briggs*, 1 Taun. 367. And where an agreement to convey land dated in 1689, was shown, a conveyance was, in 1809, directed to be presumed. *Jackson v. Murray*, 7 Johns. Rep. 5. But when the facts appearing contravene the presumption, it cannot be drawn; as when an insufficient deed to make a tenant to the *præcipe* is shown, a good one shall not be presumed. *Keen v. Earl of Effingham*, 2 Stra. 1267. Therefore, even after 20 years' uninterrupted use of lights, a grant will not be presumed against a landlord not in possession, unless knowledge of the lights having been made, be brought home to him. *Daniel v. North*, 11 East, 372. The doctrines of admissions, extinguishments, impletions and presumptions in law, would, to the scientific lawyer, afford ample materials for a valuable work.

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and when the court in the former decision said that the jury ought to have been *directed to presume an ouster* the decision undoubtedly was, that the law raised this presumption, and that the jury were not at liberty to resist it; that it was a presumption of law arising from facts, and [*91] if so, it would not be the exercise *of sound discretion, it would be an idle and useless act, to remand this cause back to another jury, in order that the deed might be admitted, and then the jury might, under the direction of the court, presume an ouster,^(a) since we perceive that the facts require that presumption, since the law raises and draws that presumption from facts of which there is no controversy, and *no other presumption* can be warranted. The deed was illegal evidence, when it appeared that the grantor's right, at the time of the execution of the deed, consisted in a right of action merely. The confessions of the plaintiffs made within a few years past, acknowledging the right of Maria by offers to purchase, whether made for the sake of peace, or from a conviction of her right, are not inconsistent with the fact of the ouster; for, admitting her claim to have been turned into a naked right, these confessions might equally have been made. They do not, therefore, weaken the conclusion drawn, or resulting from the antecedent facts.

Our opinion accordingly is, that the defendants take nothing by their motion.

New trial refused.

(a) The rule is stated, that as between tenants in common, &c., there must be an *actual ouster*. 1 Inst. 199, b; *Smales v. Dale*, Hob. 120. Therefore, the mere exclusive possession and perception of profits is not an *ouster*, (*Fairclain v. Shackleton*, 5 Burr. 2604; *Doe v. Keen*, 7 D. & E. 386,) unless accompanied with a denial of the right to either, in the co-tenant. *Doe v. Bird*, 11 East, 49. But observe that the co-tenancy cannot be availed of by the defendant at the trial if he has not entered into the consent rule specially *Jackson v. Denniston*, 4 Johns. Rep. 311. But see *Doe v. Croft*, 1 Camp. 172.

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*HENDERSON and others *against* BROWN. [*92]

If a house be liable to be assessed, trespass will not lie against an inferior officer for executing a warrant of distress though the assessment be erroneous.

TRESPASS for breaking and entering the plaintiff's close, called the New Theatre, and taking and carrying away three hundred and twenty-five pieces of silver coin, of the value of one dollar each. Plea not guilty, with an agreement that any of the facts, which now appeared in the case reserved for the opinion of the court, might be given in evidence with the same advantage as if they had been specially pleaded.

The defendant was duly appointed a collector of the direct-tax for the district in which the *locus in quo* is situated, under the act of congress,(a) entitled "An act to lay and collect a direct tax within the United States." He was(b) furnished with a list in which the *locus in quo* was designated as the dwelling-house of John Hodgkinson, and as such was taxed at three hundred and twenty-five dollars, for non-payment whereof he entered and took the silver coin in question.

The theatre and appurtenances on which the tax was laid and levied as aforesaid, were not the dwellings of any one, but merely buildings for the exhibition of dramatic performances, though the theatre itself was inserted in the list of dwelling-houses by the assessors in the valuation made under the act of congress,(c) entitled "An act for the valuation of lands and dwelling-houses, and the enumeration of slaves within the United States," and no appeal(d) was made from the assessment.

(a) July 14, 1798, con. 5, s. 1, c. 92, s. 4.

(b) S. 2, 5, 6.

(c) July 9th, 1798, con. 5, s. 1, c. 87, s. 2, 2.

(d) S. 18.

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Had the theatre and property been inserted in the land list, the tax upon it would have been less than the one with which it was now charged. The defendant had not any authority to enter and make the distress, except such as he derived under the statute imposing the tax laid upon it as a dwelling-house.

On this statement it was agreed that if the court should be of opinion there was sufficient to justify the entering and taking of the distress, a verdict was to be entered for the defendant, otherwise for the plaintiff, with interest from the time of the distress made; the form of action or of pleading not to prejudice the determination of the question on either side.

Hopkins, for the plaintiff. The act of the 9th of July 1798, specifies the kinds of property which are the [*98] subjects of valuation, and the manner of making the list. Dwelling-houses, with the outhouses appurtenant, and the lots on which the same are erected, not exceeding two acres in any case, are to be inserted in one list. All lands, &c. except those on which dwelling-houses are erected, are to be valued, inserted in another list, and valued with a reference to all buildings thereon. A theatre is not in its nature a dwelling-house. The case negatives the fact of its being the dwelling-house of any person whomsoever. It ought, therefore, to have been included in the list of lands with the buildings thereon. The manner in which the direct tax is to be levied by the act of the 14th of July, 1798, (a) makes this very material to the citizen. Houses and slaves are taxed at specific sums: upon land is assessed only the residuary sum necessary to complete the amount directed to be levied in each state. Had the theatre, which as a house is taxed at three hundred and twenty-five dollars, been placed on its proper list it would not have been assessed to one fourth of the amount

(a) Sec. 2.

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Here, therefore, is a wrong for which the law must afford some remedy. 1 H. Black. 68.(a) 4 D. & E. 2 and 4.(b) 8 D. & E. 468.(c) show that in a similar cases the remedy, in the English courts, is established to be against the collector who distrains for the tax, and that trespass is the proper form of action. The mode of redress by appeal given by the act of the 9th July, 1798,(d) is not applicable to the present case for many reasons; 1. The principal assessor can only correct inequalities in reference to other valuations: he cannot remove property from one list to the other; 2. The house or land might be very properly valued, though placed on the wrong list; in this case there would be a grievance, though nothing for the principal assessor to redress, because there would be no error in the valuation; 3. The time of appealing to the principal assessor is before the tax could by law be apportioned upon houses and lands. Therefore, although the circumstance of the theatre's being placed on the wrong list might be the ground of a serious injury to the party, yet he could not at the time of the appeal know it would so operate: nor could the principal assessor take that circumstance into consideration, or be apprised of it at the period of pronouncing judgment on the appeal.

**Hamilton*, contra. Three questions present themselves for the consideration of the court; 1. Whether this court will enter into any examination of the acts of the mere ministerial officers of the general government, acting under their revenue laws? 2. Whether the judgment of the assessor is at all examinable here? 3. Whether a warrant, upon the face of it regular, is not a complete justification to the defendant? On the first point, he said, he should not himself much insist, but as the idea had been

(a) *Harrison v. Bulcock and six others.*

(b) *William v. Pritchard, Eddington v. Borman.*

(c) *Perchard v. Heywood.*

(d) Secs. 18, 19, 20.

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entertained by gentlemen of some consideration, he thought it his duty not to pass it over in silence. On the other points, he observed, policy and justice required that mere ministerial officers should not be either compellable, or even permitted, to question the legality of the proceedings of those under whom they act. With regard to officers of courts the rule certainly is, that the writ is a justification unless the want of jurisdiction, or a manifest abuse of that jurisdiction, appear upon the face of it. The inclination of the courts has been to narrow the liabilities of all mere executive officers. In cases like the present the hardship and inconvenience of making the officer liable are great. He must be supposed innocent of any intentional wrong, and acting merely in obedience to superior orders, against which no one is bound to indemnify him. There was nothing in the appearance of the theatre to strike his senses that it could not be used as a dwelling-house. It was not a visible impossibility in the nature of the building: some part might have been occupied by the manager or Mr. Hodgkinson, as whose residence it was particularly described. The defendant did not therefore wilfully, with his eyes open, and when he was convinced he was doing wrong, commit the trespass complained of. If the plaintiffs are injured, they have their remedy by appeal to the principal assessor, who would certainly afford redress. Should it not be obtained, they may petition *congress*. The wrong now complained of, if any, is that of the assessors, and if individuals are to be made liable, the action ought to be against them, not against the collector.

[*95] *Hopkins, in reply. Trespass is the proper and only remedy for the plaintiffs, nor could it be maintained against the assessors, unless the collector were liable: if so at all, it must be as a trespasser, and he may therefore be sued separately. If it be meant that case should be brought against the assessors, that action certainly will not lie, unless they maliciously and corruptly made a wrongful

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assessment. The rule that a process, regular upon the face of it, shall justify the officer, is confined to the officers of courts of record, and extends to no others. The plaintiffs know the defendant, not as acting under any authority, but as a mere trespasser. If he avail himself of any justification under the law of the United States, he must show himself protected by it; and if the court cannot examine that authority they must reject the justification, and then the party stands without defence. Numerous cases in the books show that the acts of all officers are examinable by action in a court of record. A very common one is that against messengers of commissioners of bankrupt. So the state warrant causes. Trespass against collectors of rates, fines and taxes is every day's practice. Of this the authorities cited are proofs, and the one from H. Black. is nearly analogous: the appeal to the principal assessor cannot reach the grievance complained of. His power is to (a) re-examine and equalize the valuations. In the preceding section it is expressly provided, "That the question to be determined by the principal assessor on appeal respecting the valuation, shall be whether the valuation complained of be, or be not, in a just relation or proportion to the other valuations in the same assessment district." But the complaint here is of a different nature. Suppose the valuation in point of fact not too high in relation to other valuations, but much too low, still it may be taxed too high, because taxed as a house. How the tax would be affected by placing the theatre on a wrong list could not be known at the determination of the appeal; but even if known, the answer to the appeal would be a conclusive one: for if the property was valued either in a "just relation" to other property, or lower, the equalization which the principal assessor is authorized to make, would be no remedy for the error here complained of.

THOMPSON, J. This was an action of trespass for mak-

(a) Sec. 20

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ing a distress as collector for a tax on the theatre in [*96] New-York, *imposed under the act of congress. It is admitted on the part of the plaintiff that the theatre cannot be considered as a *dwelling-house* in the contemplation of the law, and of course not taxable as such. But it is contended that the collector is justified by his warrant notwithstanding this, so that the plaintiff has no remedy against the officer.

Officers, acting under process from superior authority, ought in all cases to be justified by their process, where that can be done consistent with the established principles of law, and the rights of parties. That the rule is not universal as it respects ministerial officers, I think well settled.(a) The distinction that is laid down in 10 Coke's Rep. 76, is, that where the subject matter of the suit is within the jurisdiction of the court, but the want of jurisdiction is as to the person or place, unless the want of jurisdiction appears on the process to the officer who executes it, he is not a trespasser; but where the subject matter is not within the jurisdiction of the court, there every thing done is absolutely void; the officer is a trespasser. If the present case be tested by this rule, the collector must be considered as a wrong-doer. The theatre was not taxable as a dwelling-house. All proceedings, then, to impose the tax or collect it, must have been without authority, and wholly void, being a subject not within the jurisdiction of the assessors. Unless the plaintiff has his remedy against the collector or the assessors, he is without redress in a court of justice, and we are driven to say here is an injury without a remedy. Admitting the assessors were liable, still this will not, upon the principles decided in the above case, excuse the collector; all are trespassers. The distinction above taken with respect to ministerial officers justifying under process appears to me analogous to the present case, and has been repeatedly

(a) Hard. 480; Buller, 82.

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recognized in the English courts, in actions of trespass against their commissioners and collectors of taxes. In the case from *H. Black. Rep.* 72, the action was brought against the collector and commissioners jointly; and in the two cases cited from *Term Rep.*(a) the action was against the collector only. No question was there raised with respect to the officer's being justified by his warrant; the sole inquiry was whether the property, for the tax of which distress had been made, was taxable; conceding that, unless it was, all the proceedings were void, and the officer a trespasser; and the property not *being consi- [*97] dered taxable in the opinion of the court, judgment was given against the collector. So in the present case, the theatre, not being taxable as a dwelling-house, the subject matter was not within the authority of the assessors, and the imposing the tax was illegal, void, and could not afford ground of justification to the collector.

I am, therefore, of opinion, judgment ought to be for the plaintiff.

LIVINGSTON, J. Upon no principle ought the defendant to be liable. It is made his duty, on the receipt of the list, to collect the tax, if not paid by a limited time. It was not for a subordinate officer, who was concluded by the judgment of the assessors, to question the propriety of the theatre's being classed as a dwelling-house. Having acted under a competent authority, and paid the money over, why should he refund the plaintiff's loss out of his own pocket, and be left to the liberality of government for his indemnity? If a wrong has been committed, and they are disposed to correct it and do justice, it is as probable they will act on the petition of the party aggrieved by the assessment, as on that of the collector; while a collector, by being thus exposed, might be ruined by a denial to reimburse him, no other individual can be very extensively

(a) 4 D. & E. 2, 4; 8 D. & E. 468.

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injured by a like refusal. In this case the assessors had jurisdiction over the subject, and their mistake in considering a theatre as a dwelling-house, must be regarded as an error in judgment, for which a collector ought not to be thus harassed. They might suppose that as a theatre yielded a considerable rent, it was reasonable it should be subject to as large a tax as a dwelling-house. In the cases cited from 1 H. Black. 68, and 8 Term Rep. 468, the proceedings were *coram non judice*. The only questions there related to the exemption of certain property *altogether* by the terms of the several acts of parliament. The officer's liability to refund was not made a point in the argument, but appears to have been submitted *sub silentio*; at any rate, these are recent cases, and not obligatory here. It is better, therefore, to sanction a rule suggested by the common sense and feelings of men, and which affords protection to every ministerial officer acting under persons clothed with proper authority, than to adopt the subtlety and refinement of certain modern decisions, which are calculated to deter inferior officers from a faithful and prompt [*98] discharge *of their functions, or to expose them to much vexation and expense.

It is also much in favor of the collector that the plaintiffs neglected to appeal. This being a remedy provided by the act, they ought not lightly to be permitted to elect another.

RADCLIFF, J. On the trial of this cause it appeared that the plaintiffs were owners of the new theatre in the city of New York; that the same was assessed and valued as a dwelling-house, under the act of congress to provide for the valuation of lands and dwelling-houses and the enumeration of slaves within the United States, and was taxed as such, in pursuance of the act to lay and collect a direct tax within the United States. The defendant was a collector, and for non-payment distrained in a regular manner, for the tax, and justifies that he had a right so to

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do. As a theatre merely, it was conceded not to be a dwelling-house within the intent of these acts of congress, and it does not appear that it was ever occupied as such. The assessors, therefore, had no authority to assess it as a dwelling-house, and subject it to the tax on houses of that description; nor could the collector derive from their assessment, or from any warrant which he may have possessed, an authority to demand a tax, which no one had a right to impose. The power of the assessors was special and limited, and ought to have been strictly pursued within the bounds prescribed by law, and it was incumbent on the collector to see that he acted within the scope of their authority and his own, and by exceeding it he became in the eye of the law a trespasser.

In England the same rule prevails in regard to their officers of the revenue, and particularly in the analogous case of their land tax. The cases in the English books are uniform and decisive on this point, and in none of them was there a doubt entertained whether the officer collecting the tax was liable.^(a) Their acts on the subject of the land tax are numerous, and bestow on commissioners, assessors and collectors, powers equally extensive with those conferred on the officers appointed under the act of congress. They have also an appeal from the assessors to the commissioners, similar to that from our assessors; [*99] and in the case of *Harrison v. Bullock and others*, reported in H. Blackstone, that appeal was made and dismissed, and the collector was still held equally liable. Indeed, I know of no cases more parallel in their circumstances, and more intimately connected in principle.

The decisions on this subject are founded on the general rule of the common law, that special powers are to be strictly observed, and that all ministerial officers concerned in the execution of them are bound to see that they are clothed with proper authority. If there be any hardship

(a) 1 H. Bl. 68; 4 T. Rep. 2, 4; 8 do. 468, and the cases cited. Vide 4 W. M., c. 1, and the acts referred to in 1 H. Bl. 68.

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in the case, it has been experienced for ages in England, and it belongs to government to indemnify its officers when acting with good faith. Individuals ought not to suffer, and they can have no other judicial remedy than the one now sought. I think it no answer to this reasoning to say that the assessors had power to assess this theatre as land, (which would subject it to a different tax,) and that, therefore, they had authority over the subject matter. Inferior officers are liable for an excessive exercise of power as well as a total want of it. If they step out of the limits assigned to them, they are equally trespassers. This is settled even in the case of magistrates executing a *judicial* trust: although they have jurisdiction over the *process* as well as the *person* and *cause*, they are liable if they exceed their authority. The extent of this doctrine is not only supported by the principles of the common law, and a current of English decisions, but was adopted by this court in the case of *Percival against Jones*,^(a) in which we gave judgment against a magistrate for exceeding his powers.

Whether by the just construction of the act of Congress it admitted of an appeal on the point in question to the principal assessor, I think immaterial. The omission to make that appeal, or if made, the decision of the principal assessor against it, would not alter the case, or conclude the appellant. Such decisions would still depend on the discretion of a ministerial officer only, and unless such discretion is declared to be definitive, or the nature of the subject requires it to be so considered, I deem it a maxim from which we ought not to depart, that no one shall be finally concluded in his rights, without an opportunity to be heard in a court of justice and the regular decision of a competent tribunal.

As to the question which concerns the jurisdiction of this court in civil cases, where the validity of an authority exercised under an act of the

(a) October term, 1800. Since reported, 1 Johns. Cases, 292.



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United States is drawn in controversy, I think it cannot originally be doubted. This is simply an action of trespass, and the pleadings are in the usual form. The question under the act of Congress arises incidentally upon the evidence on the part of the defendant, and Congress, by their act establishing the judicial courts of the United States, have expressly recognized the jurisdiction of the state courts, and provided a remedy by writ of error returnable in the Supreme Court of the United States, in case the decisions of the state courts should contravene their laws.

I am, therefore, of opinion, that we possess jurisdiction that there was no authority under the act of Congress to impose or collect this tax, and that this action is maintainable against any officer who enforced it.

KENT, J. The question submitted is, whether the plaintiffs are entitled to recover upon the facts stated.

The Act of Congress of 9th July, 1798,(a) provided for the valuation of lands, dwelling-houses, and slaves, by assessors, to be appointed by commissioners. "Every dwelling-house above the value of one hundred dollars, and the lot" on which it was erected, not exceeding two acres, was to be valued at the rate such dwelling-house was worth in money, "with a due regard to situation." "All lands and town lots, except lots on which dwelling-houses" were erected as aforesaid, were to be valued "by the quantity at the average rate" which each lot was worth in money, "in a due relation to other lands and lots, and with reference to all advantages of soil and situation, and to all buildings and other improvements of whatever kind, except dwelling houses aforesaid." In making the assessments the assessors were to require from the owners or possessors of dwelling-houses, lands, or slaves, separate lists of each, and *the lists of dwelling-houses were to specify their [*101] situation, dimensions, stories, windows, materials,

(a) Laws of United States, Vol. IV., p. 168, *et seq.*

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&c. The lists of lands and lots were to specify the quantity of each tract or lot, the number, description and dimensions of all buildings thereon, except dwelling-houses aforesaid. And the assessors were themselves to make the lists for persons not prepared to exhibit the same, and where persons, on being required or notified, refused or neglected to furnish the lists, the assessors were to enter on the lands, &c., and to make the lists from the best information they could obtain. After the lists were thus collected, the assessors were to value the same in a just proportion aforesaid, and to arrange the lands, dwelling-houses and slaves into three alphabetical lists. The principal assessor was then to give public notice in each assessment district, of the place where the lists and valuations were to be seen, and that appeals were to be received by him relative to erroneous or excessive valuations. These principal assessors were authorized to receive, hear and determine in a summary way, according to law and right, all appeals against the proceedings of the assessors: provided that the question to be determined on an appeal respecting the valuation of any lands or dwelling-houses should be whether the valuation complained of was in a just relation or proportion to other valuations in the same assessment district. The appeals were to be in writing, and were to specify the particular cause, matter or thing respecting which a decision was requested; and to state the ground of inequality or error complained of, by reference to some other valuations in the same district: and in all cases to which reference was to be made in any appeal, the principal assessor was authorized to re-examine and equalize the valuations as should appear just and reasonable. After the expiration of the time for appeals, the principal and other assessors were to transmit to the commissioners of the district, copies of their lists and abstracts of their proceedings, and the commissioners were authorized, if manifest error or imperfection appeared in the abstracts, to require the assessors that the same be explained and corrected.

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These are all the parts of the law that have relation to the assessment complained of.

By another act of Congress of the 14th July, 1798, a tax was laid and assessed upon houses, lands and slaves according *to the above valuation, and the survey- [*102] or of the revenue was to make out lists of the sums payable for every dwelling-house and tract or lot of land, distinguishing what was payable for dwelling-houses, and what for lands, and the collectors were to be furnished with these lists, and were bound to collect the sums accordingly. In pursuance of this last act, the defendant entered and collected the sum as stated in the case.

1. Upon this case I am of opinion that the plaintiffs had a remedy provided by the act for the error alleged, and that the principal assessor, upon appeal, was competent to redress the grievance. The authority was in general terms to receive, hear, and determine according to law and right, all appeals against the proceedings of the assessor. The limitation of the assessor's power upon appeal respecting the valuation of lands, &c., did not apply to this case, for here the appeal would not have been respecting the valuation, but respecting the error in placing the theatre, which was not a dwelling-house, on the list appropriated to dwelling-houses. And as the plaintiffs did not avail themselves of the remedy by appeal, they may be considered as having acquiesced in the proceeding of the assessors. Here is a special trust created by statute, and a special remedy provided for the correction of mistakes in the execution of it; and I incline to the opinion, that the determination of the principal assessor upon appeal was intended by the act to be of plenary discretion, and final authority. The multifarious and minute detail of the proceedings of the assessors seems to render such a discretion absolutely necessary to the due execution of the law; (Cowp. 524; 1 Burr. 544;) for I distinguish this from those cases in the English books where the assessors and collectors of their land tax have been held trespassers. There the commissioners had no

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authority at all over the subject matter which they included in the tax. (1 H. Bl. 68.) Here the theatre was required to be assessed by the assessors; if a dwelling-house, then as such: if not a dwelling-house, then as a lot of ground, with due regard to the improvements thereon; and, probably, the valuation would have been just the same, whether it had been placed on the one list or the other. The assessors had jurisdiction of the subject matter: they were bound to assess that building in the one view or the other, and in the exercise of that duty, it is alleged and admitted that they did not exercise their judgment duly. But [*103] this is very different from the case in which they were not to exercise any judgment at all over the subject; in which they had stepped out of their path, and taken cognizance of a subject not at all delegated to them. In such an instance their proceedings would have been truly *coram non judice*, and they trespassers. Here the subject was by law *sub judice*, and the grievance is a mere error, or mistake by them while in the exercise of a lawful jurisdiction.

2. Another ground that may be taken upon this case is, that the grievance did not arise under the act of the 14th July, by virtue of which the defendant entered. That act ordered a tax (of which the sum collected by the defendant was a part) to be assessed upon dwelling-houses, lands and slaves, according to the valuations and enumerations to be made pursuant to the act of the 9th of July. Congress by this law referred to, and adopted, the valuations that should be in fact made under the former law, without intending to discriminate between those valuations that should be accurately and truly in all respects made, from those which should be in fact made and returned in pursuance of the first law. The act of the 14th of July, having adopted the valuations under the law of the 9th of July, and ordered a tax to be laid and collected accordingly, it was a complete authority to the defendant to enter as stated in the case. It would be a doctrine, I apprehend, of most manifest incon-

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venience (if it could be maintained) that if a tax be ordered by the legislature, and to be assessed and collected according to some antecedent valuation; that the collectors of such tax become trespassers, if peradventure there should be an error in the assessment or in the arrangement of the prior valuations.

In England the annual land tax is to this day apportioned and assessed according to an antecedent valuation made as early as the year 1692, and this practice generally and necessarily prevails; in order to avoid the immense difficulty and labor of frequent valuations (a). The continental assessments were also adopted by the legislature of this state in the assessment and collection of a state land tax; and in all these cases of reference to a valuation made, or to be made, by a former law, the true construction is, that the document referred to is not to be assumed as accurate, at the peril of the ministerial officer. The act adopting it necessarily ratifies it as sound, for *the [*104] specific purpose for which it is to be resorted to.

And whether this reference be to a valuation under a law of five days, or five years antecedent to the time of making the reference, does not appear to me to make any difference in the principle. The *gravamen* now complained of by the plaintiffs did not arise under the act by virtue of which the tax was laid and the defendant entered; but under a prior law directing the valuation, and my opinion is, that the last act was a justification to the defendant, and for these reasons the plaintiffs are not entitled to recover.

Lewis, Ch. J. declaring himself of the same opinion,
Ordered judgment for the defendant.

(a) 1 Black. Com. 526.

 Callagan v. Hallett.

 CALLAGAN and others *against* HALLETT and BOWNE.

A contract with a branch pilot of New-York to assist a vessel in distress for a certain sum to be paid, is absolutely void.

Quæ. If good anywhere.

After default a motion may be made in arrest of judgment, if on the face of the record it appear that the action was not maintainable.

THIS was an action brought by the plaintiffs, who were pilots of the port of New-York, to recover five hundred dollars agreed to be paid to them by the defendants for bringing from Barnegat the brig Neptune, which had been there driven on shore.

The declaration consisted of four counts: the first, an agreement with the captain on behalf of his owners; the second, on one with the owners themselves; the third, work and labor at the request of the defendants; the fourth, a *quantum meruerunt*.

Judgment had gone by default, but on the execution of the writ of inquiry, the defendants had come in and examined witnesses.

Boyd now moved in arrest of judgment, contending that the action appeared on the face of the record not maintainable.

Pendleton, contra. It has long been settled that the master may, when in distress, hypothecate either vessel or cargo for necessities to prosecute his voyage. *Moor*, 918.(a) 2 *Ld. Raym.* 984.(b) *Noy*, 95.(c) *A fortiori* he may bind to his engagements, when the vessel must otherwise be lost. If, then, the action be maintainable, this can be the only tribunal; it cannot be in the admiralty, and the reason

(a) *Barnard v. Bridgman*.

(b) *Johnson v. Shippen*.

(c) *Sarreborrows v. Lyttel*.

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is, the court has jurisdiction in cases of hypothecation on account of the extraordinary interest, and because the contract is on the credit *of the ship or goods, [*105] and their safe arrival. Owners are not liable in the court of admiralty. 6 Mod. 79. They must, then, be answerable here. Whether the contract was with the owners or the master, is immaterial; for the contract of the master is obligatory on the owner. 2 Moll. b. 2, 208, s. 4, 15, 213. If the master ransoms, the remedy is against the owner. *Cornu v. Blackburn*, Doug. 641, and in *Yates v. Hall*, 1 D. & E. 73, the plaintiff recovered on the engagement of the master against the owners, though the vessel, for payment of the ransom of which he remained as a hostage, was given up in satisfaction of the ransom bill. In addition to these authorities, the laws of the state render the contract valid.

Boyd, contra. Principles of general policy, and the invariable leaning of the court, are against this action. The words of our law are conclusive. The species of contract in which the master can bind his owners, and the distinctions from this case, will appear to the court in 1 Salk. 35. 2 Dall 194. 1 Bro. Parl. Cas. 284, and *Abbott on Shipping*.

Per Curiam. The defendant moves in arrest of judgment. The declaration states,

1. That the defendants were owners of the brig Neptune, that the brig, when at sea and bound for New-York, was in distress; that the plaintiffs contracted with the master to bring her safe into port for 500 dollars; that they brought her in accordingly.

2. The like against owners.

3. The usual counts on a *quantum meruit*.

Three questions are raised:

1st. Whether the action is maintainable on the first count; which involves two questions.

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1. Could the master by such contract bind the owners?
 2. Was the contract lawful, the plaintiffs being branch pilots belonging to the port of New-York?

2d. Can the defendants move in arrest of judgment after attending the execution of the writ of inquiry,^(a) and examining witnesses?

[*106] . . . *3d. May not the court order an inquiry *de novo* on the third count, in the event of the first and second being held bad?

.. The question of the right of the master to bind owners, it is not necessary to decide.

The legality of the contract is most material.

The act for the regulation of pilots and pilotage for the port of New-York, (sess. 7, c. 81, sec. 2 and 3,) makes it *the duty* of pilots to give all the aid and assistance in their power to any vessel appearing in distress on the coast, and for neglect or refusal subjects them to a fine or forfeiture of their places; but for the encouragement of such pilots who shall distinguish themselves by their activity and readiness to aid vessels in distress, it enacts, that the master or owner of such vessel shall pay to such pilot who *shall have exerted himself for the preservation of such vessel*, such sum for *extra services* as the master or owner and such pilot can agree upon; and in case no such agreement can be made, the master and wardens of the port are empowered to ascertain the reasonable reward.

It being made *the duty* of the pilots to assist the defendants' vessel, it was oppression in them to exact the stipulation in question. . It would lead to abuses of the most serious nature if such contracts, founded on such considerations, were held to be legal. There are several cases in the books tending to show the leaning of courts of justice against the oppressions of persons in public trust, and the illegality of exacting previous reward for doing their duty. The law allows them sufficient compensation for extraor-

^(a) *Starks v. Thessman*, Carth. 509.

(b) *Bridge v. Cage*, Cro. Ja. 103, *Stokesbury v. Smith*, 2 Burr. 924.

Allen v. Brace.

dinary exertion after the service performed: which shows it was an object with the legislature to prevent undue advantages being taken. We are, therefore, of opinion, the first and second counts are bad, as contrary to public policy and the spirit of the act. As to the second question, whether it be too late to move in arrest of judgment after attending the execution of the writ of inquiry, we are of opinion the authorities adduced do not apply to questions on the merits, but only to formal defects in the pleadings. On the third point we are of opinion, on the authority of *Eddowes v. Hopkins*, Doug. 376, (a) [1] that the plaintiff may, on payment of costs, have (if he solicits it) an inquiry *de novo* on the *quantum meruit*, reserving the question, however, whether on such inquest he shall be entitled to more than his legal allowance, not [*107] having made the prescribed appeal to the master and wardens.

Judgment arrested.

 ALLEN against BRACE.

Venue changed in an action on a promissory note.

ASSUMPSIT on a promissory note.

The affidavit of the defendant stated fraud in obtaining it, and that his witnesses resided in the county to which it was then moved to change the venue. (a)

Motion granted.

(a) 1 Sell. 538. 2 Will. 380.

(a) See *ante*, *Bogert v. Hildreth*, page 4, r. (a), and *Woods v. Van Rensselaer*, 122,

[1] See also, *Postley v. Mott*, 3 Der. 1, 353; *Hopkins v. Beedle*, 1 Cal. R. 247; *Livingston v. Rogers*, 1 Id. 583.

END OF MAY TERM.

Costs.

COSTS.

IN answer to some questions from the clerk, as to costs,

THE COURT said, when the fee bill mentions that in certain cases there shall be but one taxation of costs, it means that in the case where plaintiff might consolidate, and yet proceeds separately, he shall have costs taxed but in one suit, and may elect the suit. The plaintiff is not entitled to charge entries on roll until the cause has progressed to an issue or judgment.

REGULÆ GENERALES.

SUPREME COURT,
October Term, 1802.

Ordered, That when a plaintiff stipulates to bring his cause to trial, on payment of costs, he shall have twenty days, after a demand made by the defendant, or any one on his behalf, accompanied with service of a certified copy of the rule to pay the costs, and of the taxed bill, [*110] to pay the same; and the defendant, *on filing an affidavit of such demand and non-payment, may, at the expiration of the said twenty days, enter judgment, as in case of a nonsuit, as of the preceding term.

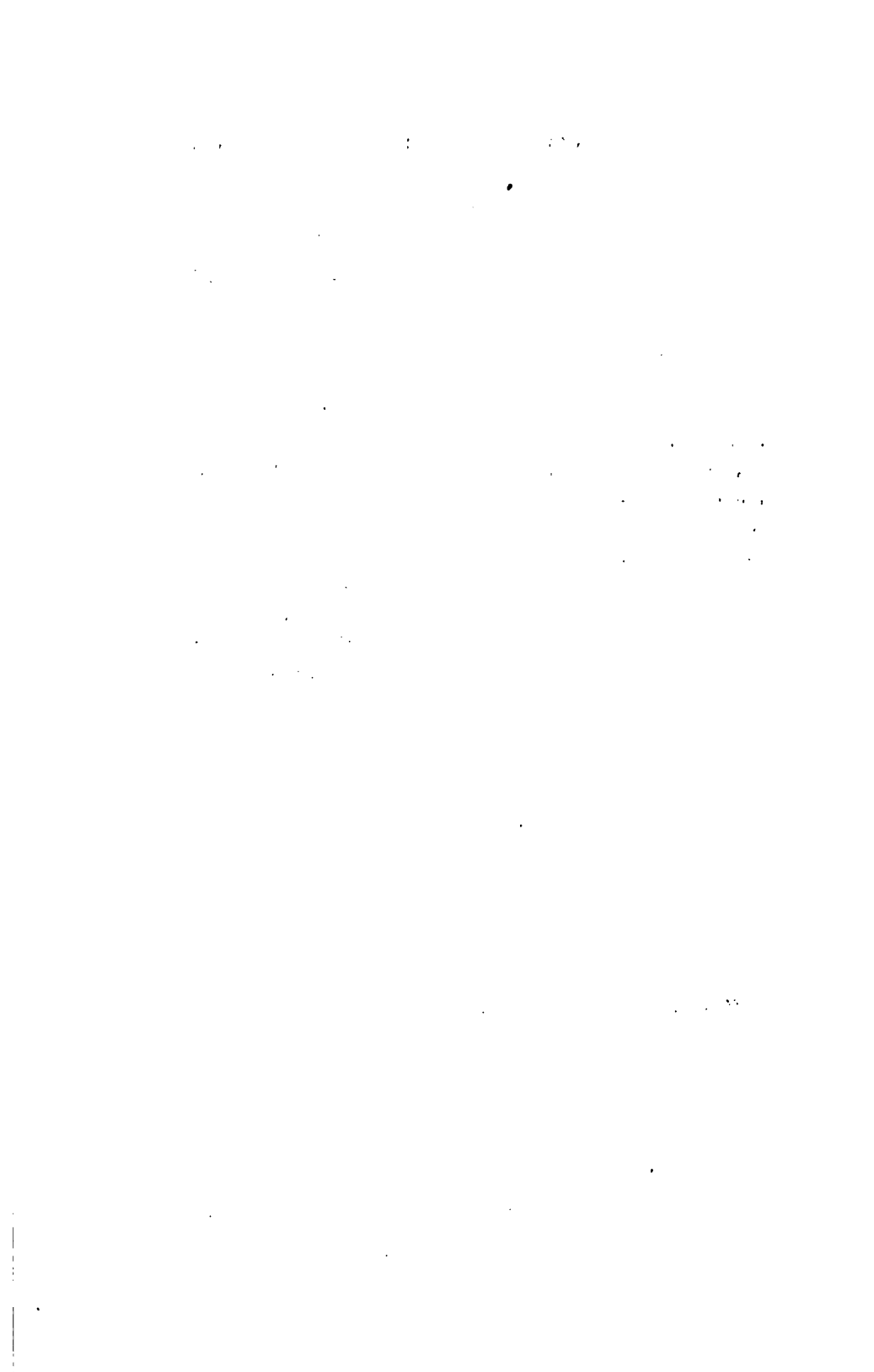
SUPREME COURT,
Saturday, January 29, 1803.

Ordered, That every attorney, when he gives notice of the argument of any enumerated motion, shall furnish the clerk residing in the city where the court shall next be held, with the date thereof; who shall, by the first day of the term, make a calendar of all causes which may be noticed, according to such dates. Causes of the same date shall be placed on the calendar in the order in which they

Costs.

are received by the clerk. Each cause shall be argued according to its standing on the calendar, if the party entitled to bring it on be ready; otherwise it shall lose its preference, and not be called again until all the others are disposed of. The attorney of either party may give notice of the argument. If any cause be inserted on the calendar during the term, it shall not take place, whatever be its date, of any that are on it at the opening of the court.

Ordered further, That to every case there shall be added a note of the questions to be made, and to them the argument shall be confined. If, however, any facts in the case give rise to other questions, these also may be argued, unless the adverse party object that they are facts not appearing material to a discussion of such new questions, in which case they shall be abandoned, or the case referred for amendment, if the court shall think it necessary.



CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW YORK,

IN AUGUST TERM, IN THE TWENTY-EIGHTH YEAR OF OUR INDEPENDENCE.

POST *against* WRIGHT AND BUCHAN.

If a cause has been duly set down upon the day-calendar, and on being called, the defendant does not appear, nor his counsel who is then in court, the plaintiff may take an inquest, which the court will not set aside though merits be sworn to, if the absence of the defendant's counsel be not accounted for.

AN inquest had been taken in this cause, at the last sittings, in June, at New York

Hoffman moved to set it aside, on two affidavits; one made by the defendants, which stated, that they verily believed that they had a good, substantial and legal defence; the other by the counsel in the cause. This last set forth that he was counsel for the Humane Society of New-York, and, in that capacity, obliged to visit the gaol on Monday in every week; that this cause being noticed for trial on a Monday, he came into court instantly after discharging his

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duty to the society, when he found an inquest had been taken in the suit; that he, on the same day, wrote to the attorney of the plaintiff, offering to pay all the costs of the inquest, and to engage to try the cause in the then sittings, if the plaintiff would abandon his inquest, which he refused to do.

Hoffman also observed, the calendar had been gone through more than once, and that the plaintiff needed not to have lost the sittings but for his own obstinacy.

[*112] **Woods* relied on the counter affidavit of the plaintiff's attorney, which stated, that the cause was duly set down in its order on the day docket; that it was regularly called and tried; that when called on,———, Esquire, was in court, and, in the hearing of the deponent, said he was of counsel for the defendants, but as he did not see his client, nor any of their witnesses, he would not appear; that on this the defendants were called, and an inquest taken.

Woods remarked, that, if, after these facts, the inquest should be set a side, there would be no end to these applications. A defendant had only to keep himself and his witnesses, or even his counsel, out of the way, and be sure to gain a term whenever he pleased.

Per Curiam. All reasonable notice to attend and defend the suit was given. The cause was on the day docket, and there is no kind of excuse(a) why the defendant was absent.

(a) See *M'Kay v. Marine Ins. Co.*, 2 Caines' Rep. 384, the absence of counsel discountenanced as an excuse; and *Sayer v. Finck*, Ib. 336. The same excuse reluctantly admitted, though the plaintiff's counsel was absent, from an opinion that the cause would not come on, induced by expressions to that effect from the partner of the attorney on record for the plaintiff. The rule seems to be, that as it is the duty of counsel and attorney to attend, that duty will not be dispensed with, unless in cases of necessity, or misconception. See *Rogers v. Garrison*, 2 Caines' Rep. 379.

See also *Furnam v. Despard*, 1 Wend. 287; *Jackson v. Wadman*, 2 Cow. 578.

Ryers v. Hillyer.

He had a counsel in court, and might have been there himself, with his witnesses. The defendant, therefore, can take nothing by his motion.

Hoffman urged strongly the rigour of the practice, that it would operate only against the attorney of the plaintiff, that it was the first instance of such strictness.

THE COURT answered, there must be a first time in all proceedings; that they found it necessary to enforce their rules, and had made a determination so to do, as the only mode of having them obeyed.

Motion denied.

RADCLIFF and LIVINGSTON, Justices, absent.

RYERS against HILLYER.

If a notice of motion for nonsuit be titled *versus* instead of *ad sectum*, and the affidavit annexed rightly titled, the notice will be good.

SPENCER moved, on the common affidavit, for judgment as in case of nonsuit for not proceeding to trial.

Hoffman resisted the application, because the notice was entitled *William Hillyer* against *Joyn P. Ryers*, instead of *William Hillyer ad sect. John P. Ryers*; this, he said, was fatal, there being no such suit in existence as the one in which the notice was given, but he added, he would not have urged it except from its being one of Mr. *Colden's* causes, whose state of health the whole court knew.

Spencer, contra, observed, that there could be no force in the objection, unless it appeared that the party had

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[*113] been *misled.(a) The notice was for judgment as in case of nonsuit for not proceeding to trial; therefore, it must have come from a defendant. In the next place, it was an affidavit, a copy whereof was annexed, and that affidavit was rightly entitled: It is a mere question of who shall pay costs. There has been no countermand, and the defendant kept all the circuit with his witnesses.

Hoffman. As this is the first default, will the court oblige us to stipulate?

Per Curiam. Stipulate to try at the next circuit for the city and county of New York, and pay the costs of the present application.

On stipulating, and paying costs,

Motioned denied.

RADCLIFF and LIVINGSTON, justices, absent.

(a) This is the true principle. Therefore, where the christian name of a plaintiff was "Teunis," and the notice "Jeunis," as there was no other suit against the defendant by a person of the same surname as the plaintiff, the variance was deemed immaterial. *Quick v. Merrill*, 3 Caines' Rep. 133. So a notice to quit, styling the premises "The Waterman's arms," was held good, though the sign of the house was "The Bricklayer's arms," the defendant holding no other house of the plaintiff, and there being no such sign as "The Waterman's arms" in the parish. *Dec ex dem. v. Ous et al. v. ———* 4 Esp. Rep. 185. See post, 344.

On the same principle where a notice of executing a writ of inquiry "on Tuesday the 14th of January inst." was given, the court of C. B. refused to set aside the execution of the writ, because the 14th was on a Thursday, saying it was clear the defendant could not have been misled. *Bulfin v. Harrison*, 3 Bos. & Pall. 1.

Brandt v. Buckhout.

BRANDT, on the demise of W. R. VAN COURTLAND and P. VAN COURTLANDT, *against* M. and A. BUCKHOUT.

If there be a neglect in not proceeding to trial, defendant must avail himself of it the first opportunity; if he do not, it will be a waiver, and subject him to costs, if he afterwards move for judgment as in case of nonsuit.

THE issue in this cause had been joined in January, 1801, and notice of trial given in the June following: it however did not come on, in consequence of the defendants applying for a commission to obtain testimony from Virginia. On the arrival of the commission in that state, it was found the witness had removed into Kentucky, whither he was followed, and his evidence, to the interrogatories, taken on a deposition, made before two justices of the peace. A copy of this, accompanied with an affidavit of the facts, was served on the plaintiff's attorney in August, 1802, and communication at the same time made, that a regular commission would be sued out and sent into Kentucky. On this the plaintiff did not notice for trial; for not proceeding, however, to which,

Woods now moved for judgment as in case of nonsuit.

Spencer opposed the application, as being too late, insisting it ought to have been made the very first term after the neglect, and asked for costs of resisting the application.

Per Curiam. The defendants have not accounted for their delay; if that be not done, and the application be not immediately after the laches, the default is waived, and cannot now be taken advantage of.(a)

Motioned denied, with costs.

RADCLIFF and LIVINGSTON, justices, absent.

(a) S. P. *Gillet* *ads. Wilde*, Col. Cas. 64. S. C., 1 John. Cas. 30.

See also *Mumford v. Col. Ins. Co.*, 2 Cal. R. 251; *Chapman v. Van Alstyne*, Wen. 517; *Harrison v. Stevens*, 7 Wen. 519; *Anon.*, 9 Wen. 461

Camman v. New York Insurance Company.

[*114] *CAMMAN *against* THE NEW-YORK INSURANCE
COMPANY.

The rule for consolidating applies only to several actions on one policy, and does not extend to several policies on one risk, though the question be the same on all, because the contracts are several.

THE plaintiff had, for himself and several other persons with whom he was variously interested, effected eleven policies on distinct parts of the cargo of the same vessel. The name of the plaintiff was in each insurance, but associated with different parties, according as he was connected. The point in dispute was the same in all.

Hoffman moved to consolidate the actions, or to stay proceedings in ten of the suits till the eleventh was determined; the defendants being willing to pay on the residue, if that should be determined against them. The object of his endeavor was, as he said, to save the enormous costs which would otherwise accrue.

L. Ogden. The contracts are several; and though a number of actions on one policy will be consolidated, that is because the contract is one, and therefore the very reason of the practice in such a case is sufficient to overrule the present application.

An application was made by myself to this court, for leave to consolidate five actions on five promissory notes to the same plaintiff, and refused, because of the diversity of the contracts.(a)

Per Curiam. The contracts being separate and independent it is not a case for consolidation, and not to be dis-

(a) By the practice of the English courts, if the defendant be held to bail in two actions which might be joined, the plaintiff will be obliged to consolidate and pay the costs of the application. *Cecil v. Briggs*, 2 D. & K. 639.

Shuter v. Hallett.

singular from that of the notes. There never was an instance of consolidating different policies.^(a)

Motion denied.

RADCLIFF and WASHINGTON, Justices, absent.

*SHUTER against HALLETT.

[*115]

If the defendant has joined in a commission, the court will not, on the plaintiff's application, vacate the rule by which it was granted, but will grant one to proceed to trial notwithstanding the commission.

D. L. OGDEN moved for a rule to vacate the rule for a commission which had issued in this cause in the spring of 1802. The facts, as appeared by affidavit, were these:

A commission had issued as above, in which the defendant had joined, but not being returned, another was sued out in November last, and as there were no hopes of the first being returned, the parties agreed that the testimony taken on the second, which was on the same interrogatories, should be read in evidence on the trial. After this

(a) On promissory notes the court refused to consolidate, though the suits were between the same parties. *Philips & Ludlow v. Roget*, Caines' Prac. 134, from MS. Kent, Ch. J. So where the notes fell due on different days, the K. B. denied the application. *Mussenden v. O'Hara*, 1 Tidd, (edit. 1803,) 556. The same principle governs in ejectments. When there are several defendants, who have several interests, the court will not consolidate. *Medicot v. Bruster*, 2 Keb. 524. *Aliter*, where the suits are for the same premises on the same demise. *Grimstone v. Burgers and others*, Barnes, 176. In actions on policies of assurance, where the rule for consolidating does apply, the court will grant imparlances in all but one, till the plaintiff's consent to enter into the consolidation rule, which is the same as that in the English courts. *Church v. Clavin & Skingley*, 10 Cl. Cas. 62. Where after consolidating a cause in one inferior court, the plaintiff discontinued in that court, and brought, for the same cause, an action in another court, proceedings were stayed till after trial of the principal cause in the consolidation rule. *Parfen v. Scott*, 1 Tatt. 565.

 Way v. Bradt.—Weed v. Ellis.

the cause was duly noticed, but the judge refused to let it come on, as the counsel for the defendant had joined in the commission.

Per Curiam. The commission is as much the defendant's as the plaintiff's and he may take the benefit of it on trial. We cannot, therefore, vacate the rule, but the plaintiff may have one to proceed to trial notwithstanding the commission.(a)

Motion denied.(b)

RADCLIFF and LIVINGSTON, Justices, absent.

WAY, and HANNAH his wife, *against* BRADT.

Costs of circuit.

It was said by the court, in this suit, that when a judge on a circuit has not time to try a cause, the costs must abide the event of the suit.

RADCLIFF and LIVINGSTON, Justices, absent.

E. WEED, by N. WEED, his Guardian, *against* ELLIS.

A younger issue tried, no proof that an older might have been heard.

THE COURT ruled that a younger issue being tried, is not always conclusive that a cause might have been brought

(a) See *Brain v. Rodeicks and Shivers*, ante, 74. See Note [2] ante.

(b) See *Kirby v. Walker*, post, 593. *Caines' Prac.* 428—430: inclusive

 Grover v. Green.

m.(a) At a circuit the judge will sometimes take up a cause he may think short, when he will not enter into a long one.

RADCLIFF and LIVINGSTON, Justices, absent.

 GROVER *against* GREEN.

Court will not discharge on motion, a person arrested while attending a reference under an order of the Common Pleas, if there be not a notice of applying; but will only grant a rule to show cause.

THE defendant was attending a reference, under a rule of the court of common pleas for Cayuga, in a suit wherein *he was plaintiff, and the present plain- [*116] tiff, defendant, when he (Green) was arrested by Grover, on a writ out of this court.

Emott moved for a rule that the defendant be discharged out of custody, on common bail, the plaintiff having abused the process of the court, but no notice had been given of the motion.

Per Curiam. By this means any body may get himself discharged.

Emott. If the affidavit be false, the party may be indicted for perjury.

Per Curiam. But the plaintiff may lose his debt. Take a rule to show cause the first day of next term why he

(a) *S. P. Jackson v. Valentine*, 3 Caines' Rep. 128. See *Jackson v. Chambers*, *post*, 171.

Lackey v. McDonald.

should not be discharged, and in the mean time let proceedings be staid.

Motion denied; rule to show cause ordered. (a) 201.

RADCLIFF and LIVINGSTON, Justices, absent.

LACKEY and BRIGGS against M'DONALD.

When a defendant commits a crime for which he is sentenced to the state prison, the plaintiff may discontinue without payment of costs.

THE plaintiffs, in July, 1802, had stipulated to try this cause at the next circuit court, and did not do so.

M. B. Eldred, on this ground, now moved for judgment as in case of nonsuit.

Schoenhoven read an affidavit, which was not denied, stating that the defendant, after the commencement of the suit,

(a). The rule as to immunity of persons is, that all whose attendance is required in a court of justice, either directly on the business of the court, or in any manner relative to that business, shall be protected from arrest, *coram*, *in*, *re-cundo*. *Meekins v. Smith*, 1 H. Black. 636. On the arrest, therefore, of either plaintiffs or defendants, when going to attend their cause, it will be put off, and, without costs, if there be any collusion with the creditor, until the return of a *ha. cor.* which the judge at N. P. will grant. *Solomon v. Underhill*, 1 Camp. 229. Bail attending to justify. *Meekins v. Smith*, *ubi sup.* So persons upon recognizance at the sessions. *Bours v. Tuckerman*, 7 Johns. Rep. 538. Witnesses to prove a will. *Norris v. Beach*, 2 Johns. Rep. 294. For the purposes of protection, all before whom proceedings in a cause are judicially heard, are quasi a court of justice. Commissioners of bankrupt, (*Andiege v. Flower*, 8 D. & E. 524,) arbitrators, (*Spence v. Stewart*, 3 East, 89,) and referees under a rule at N. P. (*Monre v. Booth*, 3 Ves. Jan. 250.) Waiting at a coffee-house from day to day, if in the vicinity of the court, is held to be within the *morando*. *Childerton v. Barrett*, 11 Binn. 429. Staying in the afternoon to dine at a tavern in the neighborhood of the court, within that of *redeundo*. *Lightfoot v. Cameron*, 2 Black. 1113.

Lucky v. McDonald.

and before a trial could be had, was sentenced to the state prison, where he still remained, and prayed to discontinue without payment of costs.

Van Ness, amicus curiae, mentioned, that when the defendant rendered proceedings useless, the court was always disposed to permit a plaintiff to discontinue without costs. In *Jackson, on the demise of Ludlow, vs. Webb*, after issue joined, the defendant abandoned his possession, and the lessor of the plaintiff having entered, did not notice the cause for trial. The defendant then moved for judgment as in case of nonsuit, but the court denied his motion, and gave leave to discontinue without payment of costs. [1]

Per Curiam: The opinion of the court is, that sufficient has been shown to prevent the judgment of nonsuit. The defendant has by his own act deprived the plaintiffs of that remedy which they might have had. [*117] against his person; his body is out of their reach, and that by his own act. It is not, therefore, necessary that they should proceed and incur expenses for nothing, as there is not any property from whence they can be reimbursed. The plaintiffs, therefore, are entitled to discontinue, and without costs. (a)

Motion granted.

RADCLIFF and LIVINGSTON, Justices, absent.

(a) In civil cases, the principle of this decision is adopted. Whenever, therefore, a defendant has obtained his discharge under an insolvent law, the plaintiff may discontinue without costs. *Story v. Hart*, 1 Johns. Rep. 143. But unless the discharge be obtained he will not, for mere insolvency is no ground for discontinuing as a right. *Collins v. Evans*, 6 Johns. Rep. 332. See *Shaw v. Wilmerden*, 2 Caines' Rep. 380.

[1] As to discontinuing without costs; see also *Case v. Ballen*, 5 Cow. 422; *Emery v. Barge*, 2 Cow. 121; *Helmes v. Wrigley*, 1 Hall, 145; *Labron v. Woram*, 6 Hill, 373; *Fyfield v. Brown*, 2 Cow. 503; *Ludlow v. Haskett*, 18 J. R. 252; *Van Buren v. Flirt*, 4 Wend. 209; *Arden v. Morritt*, 1 Wend. 91; *Camp v. Gifford*, 7 Hill, 169.

Malin v. Kinney.

MALIN against KINNEY.

THE SAME against LANE.

If a plaintiff get relieved from his own stipulation, he restores the defendant to all rights as he stood when the stipulation was entered into.

THESE causes were noticed for trial at the circuit held for Ontario, in June, 1802. The defendants attended with their witnesses, but the plaintiff not bringing on the causes, the defendants agreed to waive taking advantage of it, provided the plaintiff would consent that the two above suits should abide the decision of a case made in one by the same plaintiff against George Brown, which turned on the same point, and had, together with another of the same sort, been tried. The plaintiff acceded to the proposition, but at the last term applied to the court to be released from his engagement. This the court was pleased to order.

Emott now moved for judgment of nonsuit, and that the plaintiff pay the costs not only of not proceeding to trial in 1802, but those also for not trying at the last circuit.

He contended, that as the agreement was done away on the application of the plaintiff, the defendant had a right to those costs which he waived only in consequence of that agreement. The agreement was the consideration of the waiver, and the consideration being taken away, he had a right to insist on not waiving. Then as to the costs of the last circuit, it was clear he was entitled; because, as the plaintiff had been released and had not tried, it was manifest he was in default, and costs due.

Stuart, contra, read an affidavit, stating that the rule to discharge the agreement was made at the latter part of the last term, and that, from the late information he received of it, he could not avail himself, at the last circuit, of the advantage it afforded.

Malt v. Kinney.

Per Curiam. The application is for judgment as in case of nonsuit, and to pay two sets of costs; those of June, *1802, and those of the last circuit. Four [*118] causes were depending: two were tried, and, after the court rose, there was a stipulation that the two causes not tried should abide the same event as those which had been tried. An application was made in May last to be relieved; (a) that the two causes not tried might be restored, and the plaintiff not bound by his stipulation. This was ordered, and the causes restored, as in June, 1802. If the plaintiff was relieved, the defendant was also; and then the stipulation being vacated, the causes must stand in the same situation as in June, 1802. If the defendant had then applied, nothing appears why the rule should not then have been granted, at least a rule to stipulate and pay costs. The only reason to excuse now offered is, that the plaintiff did not receive notice of his own rule. Both circuits mentioned have passed without trial; therefore, the defendant must have the effect of his motion, unless the plaintiff stipulate to try the cause at the next circuit, and pay the costs of that in June last.

On stipulating and paying costs,

Motion denied.

RADCLIFF and LIVINGSTON, Justices, absent.

(a) See ante, 1, *Boget and Lewis v. Hildreth*, when he will not be relieved.

Spencer v. Webb.

SPENCER *against* WEBB, on *scire facias*.

In *sci. fa.* notice of entry of the rule to appear and plead need not be given, as the service of the *sci. fa.* is notice of itself, and the default may be entered on expiration of the rule; but judgment cannot be entered till four days after; if it be, the judgment will be set aside, and the default, if regular, stand. No default ever set aside when regular, except accounted for to the satisfaction of the court.

THE facts, as they appeared by affidavit, were as follows:

The defendant was served with a *scire facias* on Tuesday, the 3d of May last, which was returned *scire feci* on the 10th. On the same day the plaintiff entered a rule for the defendant to appear in four days, and plead in twenty after notice, or that his default be entered. Notice of the rule was not given, nor was it put up in any conspicuous part of the clerk's office, nor was any affidavit of notice on file. Default was entered, without any such affidavit, on the 14th of May, on which day the plaintiff entered his judgment also. The defendant swore to a just and material defence, and that he had paid the plaintiff six hundred dollars which had not been allowed him, and offered to let the judgment stand as a security.

Van Vechten, upon an affidavit stating the above facts, moved to set aside the default and judgment thereon, and that the defendant be let in to plead.

Spencer. Several grounds of objection may be [*119] taken to the proceedings. One is, that notice ought to have been given of the return of the *sci. fa.* and of the rule entered. From the fourth rule of this court, made in April term, 1796,(a) it appears, that rules

(a) Cole. Cas. 2, 2.

 Spencer v. Webb.

to appear on *sci. fa.* and in ejectment, are placed on the same footing. It is not necessary, on entering the rule, to give notice that the rule has been entered. The notices by the *sci. fa.* and in ejectment, by the declaration, are tantamount. When the attorney appears, then notice is required; but a *sci. fa.* is notice in itself. The default, therefore, being regularly entered, must stand. The next question, then, is whether, if the proceedings are correct in entering the default in four days, the court will let the defendant in, on the merits? *Griswold v. Staughton*,^(a) decided the last term, is in point, that as there is no account given for not appearing, the default is correct, and will not be set aside. There is no excuse for not entering an appearance, and for four days the defendant certainly slept. In *Edwards ad. M'Kinstry*, Cole. Cas. 124, the court said that a default must always be accounted for.

Graham, *amicus curiæ*, observed, that it being a point of practice of some importance, he begged leave to mention that, according to the English practice, when, on a *sci. fa.* to revive, two *nils* were returned, judgment was signed of course on showing the returns to the office.

Van Vechten. We are not to obtain the effect of our motion for two reasons. Because, according to the English practice, there are no rules on a *sci. fa.*, and because no account is given for the default. As to the first, whatever the practice may be in England, our courts have established that a four day rule is to be entered on the return of the writ, and then the ordinary rule is to be given, and if the default be not entered, the defendant may come in at any time. A *scire facias* is to all intents a new suit, and, therefore, there should be the same practice as in other cases; there may be a plea, &c. In this the default has produced no injury. There could be no judgment till next term.

(a) *Ante*, 6.

Spencer v. Webb.

Therefore, this rigid rule of saying that if you do not account we will not hear you, though you give evidence of *reasons for our interference, can have no force when we apply to the discretion of the court. The power used in these cases is founded on justice, and whenever any thing like injustice presents itself, the court will interpose and see that no advantage is taken. Here the defendant offers to let the judgment stand, therefore the plaintiff runs no risk, as the defendant's lands are bound. He swears six hundred dollars have been paid on the judgment. The question then is, whether the defendant does not necessarily deserve favor. Whether the plaintiff shall have execution for six hundred dollars more than are due when merits are sworn to. That the plaintiff is able to re-pay it, is no answer; the oppression of thus wringing so much from the defendant may be intolerable. Notice, either express or constructive, is necessary to a default; here there is neither. *Griswold v. Stoughton* does not apply; it was a mere irregularity and no affidavit of merits. The court cannot too much bear in view that no injury can result by letting the defendant in to plead.

Spencer, in reply, said he had strong doubts whether, on a *scire facias*, there could be any defence(a) except *nul tiel record*, or the judgment satisfied.

(a) To a *sci. fa.* the defendant may plead in abatement, or in bar. 2 Inst. 470. But he can plead nothing in bar. which he might have pleaded to the original action. This rule, as to pleading, applies equally, though the judgment be by confession. Therefore, if there be any matter prior to the judgment which might be urged against the execution sought by the *sci. fa.*, the court must be applied to by motion, as it cannot be pleaded. *M'Furlan v. Irvin*, 8 Johns. Rep. 78. But where the judgment was on a warrant of attorney, as the defendant could have had no opportunity of pleading, the court of K. B. has ordered an issue to let in the defence of usury. *Cook v. Jones*, Cowp. 727. The defendant may also plead in abatement that there were not fifteen days between the teste and return; (*Nares v. Earl of Huntingdon*, Lut. 9, 12,) and for want of these fifteen days the Supreme Court has set aside, on motion, the proceedings on a *sci. fa.*, (*Woodman and others adm. Little, Cole*, Cas. 54,) as a *scire facias* is a judicial writ. See Com. Dig., title Abatement (H. 14)

Spencer v. Webb.

Per Curiam. It appears that the defendant did not enter any appearance before the expiration of the rule, nor indeed was it until some weeks after that any appearance was entered. It is suggested in answer, that notice ought to have been served of the entry of the rule; this is, on the other hand, denied; and rightly. The default, therefore, is regular, and no reason whatever is assigned how it has been incurred. In all such cases we have determined to hold the party to his default. The rule(a) of this court says, "Upon the return of writs *sci. fa.* if the defendant be returned warned, or the second writ be returned *nihil*, the defendant shall *appear in four days, or [*121] judgment shall be entered by default." Therefore the entry of the default is perfectly consistent with the practice of the court, and must remain. But as judgment ought not to have been signed till four days after, and it appears to have been done on the very day, *that* is irregular, and therefore must be set aside.(b)[1]

Motion granted, as to setting aside judgment only.

RADCLIFF and LIVINGSTON, Justices, absent.

(a) Rule of October, 1791, Cole. Cas. 31.

(b) On a verdict a rule *nisi* for judgment may be entered the first, or any other day in term, *Rose v. Rock*, 6 Johns. Rep. 330, though an order to stay proceedings has been obtained, *Hackley v. Hastie* and *Patrick*, 3 Johns. Rep. 252. But even an interlocutory judgment on a default cannot be entered in vacation, though a term has elapsed since entering the default. *Hogiboom v. Genet*, 6 Johns. Rep. 325. Before a default can be entered, *for want of a plea*, there must be twenty days after service of notice, which are counted one day exclusive, and one day inclusive; that is, you exclude the day whereon the service is made, and include, as within time, the twentieth day afterwards, within the whole of which day the defendant has to plead, and a default cannot be entered till the day after, or on the twenty-second day. *Hoffman v. Ducl*, 5 Johns. Rep. 232. If the time thus calculated expire on a Sunday, the default cannot be entered till the Tuesday, for the defendant has the Monday, because he is entitled to twenty *law* days, and Sunday, being *dies non juridicus*, is as no day. *Cock v. Dunn*, 6 Johns. Rep. 326

[1] For proceedings to revive a judgment, see Code of Procedure, sect. 316, *et seq.*

 Neilson v. Cox.

NEILSON *against* C. COX, M. BECKMAN, and A. H. BECKMAN and WIFE.

In partition, if the defendants do not appear, the court will, on motion, make an order for partition as prayed.

IN partition.

The defendant had not appeared, and the act not specifying any mode of compelling them to come in, Woods, on behalf of Riggs, moved for the following rule, which, after being submitted to the court for perusal, was ordered.

RULE.

NEW-YORK SUPREME COURT.

IN PARTITION.

William Neilson

v.

Catharine Cox, Magdalene Beckman Abraham H. Beckman and Johannah his wife.

The defendants having neglected to answer or to plead to the petition of the plaintiff, within the time allowed them by a rule


of this court for that purpose, and it appearing by the said petition, that the plaintiff is seised in fee-simple, as tenant in common, of two undivided fifth parts of the premises in the said petition mentioned, and that the defendant Catharine Cox is seized in fee-simple, as tenant in common, of one equal undivided fifth part thereof, and that the defendant Magdalene Beckman is seised in fee-simple, as tenant

If this mode of calculation had been adopted, the default would have been entered too soon; for it was entered on the fourteenth, on a return of the tenth. The English rule on *sci. fa.* expires four days exclusive of the day in which given; (2 Tidd, 1848, last ed.,) it would seem, therefore, that according to our rule the calculation of time on a rule in *sci. fa.* to appear varies from the English, and from that on a rule to plead. The words of the 4th rule of April, 1796, are a rule "of four days." The English practice is to enter judgment on the day of default in appearing.

Woods v. Van Ranken.

in common, of one equal undivided fifth part thereof, and that the defendants Abraham H. Beekman and Johannah his wife, in right of the said Johannah, are seised in fee-simple of one equal undivided fifth part thereof; which not being denied, THE COURT DOTH THEREFORE DETERMINE the rights of the said parties to be, as in the said petition is stated, WHEREUPON, and on motion of Mr. Riggs, attorney *for the plaintiff, IT IS ORDERED, that [*122] partition of the said premises be made between the said parties, according to their said respective rights, and it is ordered, that A. B., C. D. and E. F., being three reputable freeholders of the city of New-York, be, and they are hereby appointed commissioners to make the said partition among the said parties, quality and quantity relatively considered, according to the respective rights of the parties aforesaid. Partition as prayed.

Ordered accordingly.[1]

 The commissioners are named by the party to the court, and if approved of, appointed according to the nomination.

RADCLIFF and LIVINGSTON, Justices, absent.

WOODS against VAN RANKEN.

To change the venue in a transitory action, very special cause must be shown.

VAN VREHTEN moved to change the venue from New-York to Albany, in an action on the following promissory

[1] For proceedings for the partition of real estate, see Code of Procedure, *secs. 408; Myers v. Rankin*, 4 How. P. Rep. 88; *Barker v. Stiles*, 3 Id. 518; *Howe agt. Howe*, 4 Id. 183; *Traver agt. Traver*, 3 Id. 251; *Reed agt. Child*, 4 Id. 125.

Woods v. Van Ranken.

note: "On or before the 18th day of February next, for value received, I promise to pay at the Bank of Albany, to Maus R. Van Ranken or order, seven hundred and twenty-five dollars. Witness my hand this 9th day of August, 1802.

"DERICK TEN BROECK."

The deposition on which he moved, stated it to have been given on a usurious consideration, but did not set forth in what the usury consisted, nor between whom it had passed.

Woods read an affidavit made by the agent of the plaintiff, who was the second endorsee, denying all usury in himself, or any one else, to his knowledge, and that the note was taken in part payment for a *bona fide* sale of goods in New-York. In addition to this, *Woods* insisted on the general rule, that in transitory actions the venue is never changed except on very cogent and strong circumstances. He also relied on the deficiency of the defendant's affidavit.

Per Curiam. This is an application to change the venue in a transitory action; special cause(a) ought, therefore, to be shown. We are of opinion that what has been done is not sufficient to take the case out of the general rule adopted with respect to suits of this nature. The defendant ought to have offered as much to change, as the opposite party would have been obliged to allege in order to retain.

Supposing, therefore, *that* to be the criterion, he [*128] ought to *show when the usury originated, and that the witnesses resided here; but the affidavit does not state when the usury took place, nor that the cause of action arose in Albany. For though the note is apparently made here, and payable at the Bank of Albany,

(a) *Jenkins* ad. *Union Turnpike Company*, Caines' Prac. 126. *Sayer* and *Hurd* v. *Brevoort*, id. *ibid.* *Slosson* ad. *Wharton*, Col. Cas. 121. *Baker* v. *Sleight*, 2 Caines' Rep. 46. *Gibbs* ad. *Scott*, Col. Cas. 137.

Jackson v. Mann.

it was negotiated in New-York, and the presumption is, it was made where it was passed. The doctrine now acted upon is established. 1 D. & E. 781.(a) It is necessary to show that the cause of action arose, and that material testimony is to be given in the place where the venue is to be removed. The defendant, therefore, can take nothing by his motion.

Motion denied.(b)

RADCLIFF and LIVINGSTON, Justices, absent.

JACKSON against MANN.

If a plaintiff notice his cause for trial, and afterwards countermand it, he must pay the defendant the intermediate costs of *subpoenaing* his witnesses.

WOODWORTH moved for judgment as in case of nonsuit, for not proceeding to trial according to notice, on an affidavit stating that the cause being duly noticed, the defendant issued and served *subpoenas* on his witnesses, after which the notice was countermanded.

Schoenhoven, contra, read an affidavit setting forth that the plaintiff, for want of a material witness, who could not

(a) *Foster v. Taylor*.

(a) In transitory actions, the courts are not disposed to take from the plaintiff his right of electing the venue; *Holcroft v. Colwest*, Andr. 65, therefore, on an award day it has been refused; *Whitburn v. Staines*, 2 Bos. and Pull. 355, yet on a promissory note it may be changed; *Kirk v. Broad*, Say. 7, especially if some serious inconvenience will arise from denying the application. *Deans v. Weaver*, 1 Bos. and Pull. 20. But in the O. P. engaging to give evidence on a count on a promissory note, in the county where the venue was laid, has been held a sufficient cause for denying a change. *Duke of Bedford v. Bray*, Barnes, 491. *Downes v. Brian*, 2 Black. 993. See ante, p. 4, n. (a).

Jackson v. Mann.

be then found, was unable to proceed to trial; and that notice of countermand had been given four days before the circuit court; he therefore insisted; there was no ground for the application, and that from the principle of *Brandt v. Buckhout*,^(a) the defendant could not only take nothing by his motion, but the plaintiff was entitled to his costs for opposing.

Woodworth distinguished this from the case mentioned, by the defendant's having been here put to costs.

Per Curiam. The only question here is, who shall pay the expense. The plaintiff must certainly bear the charges of his own countermand; *that* and the notice are equally his acts; the expenses therefore incurred after notice, always fall to him, when he countermands. The judgment of nonsuit must, therefore, be refused, but the plaintiff to pay the defendant the costs of *subpoenaing* his witnesses prior to the countermand.[1]

On payment of costs up to the countermand,

Motion denied.

RADCLIFF and LIVINGSTON, Justices, absent.

(a) *Ante*, 113.

[1] See 2 Rev. Stat. 618, sec. 36; *Keys v. Boardley*, 18 J. R. 125; 2 Wend. 241; 1 Id. 97; *Jackson v. Brown*, 1 Cal. R. 484.

 Martin v. Bradley.

***MARTIN** against BRADLEY, B. and N. BEACH, [*124]
 Administrators of E. BEACH, late Sheriff of
 Onondaga.

Debt will not lie against the administrators of a sheriff, for an escape in the lifetime of their intestate.

DEBT against the administrators of the sheriff of Onondaga for an escape in the lifetime of their intestate.

General demurrer to the declaration.

Henry, in support of the demurrer. The present question will give but little trouble to the court, for as it is debt for an escape against the administrators of a sheriff, it will be brought to a single point, whether this suit does not fall within the rule of "*actio personalis moritur cum persona*." It is founded on a *tort*, arising *ex delicto* of the intestate. 3 Black. Com. 302, is express that it is not maintainable, because the right against the intestate is derived *ex delicto*, and therefore dies with the person. In the case of *Hambly v. Trott*, Cowp. 375, Lord Mansfield, in settling the meaning and extent of the rule now insisted on, specifies the action of escape against a sheriff, as one which, from its cause, dies with the person. It is an injury *ex maleficio*, from which the intestate derived no advantage to himself, and this is the principle on which his personal representative is not answerable. Ibid. 376. The same doctrine is to be found in Fitzh. N. B. 121, A. n. a. In *Berwick v. Andrews*, 6 Mod. 126, (a) case 171. In *Dyer*, 271, a. (b) the same principle is acknowledged, for it is there ruled, that debt for an escape will not lie against an heir. And in *Whitucres v. Onelsey* and others, executors, (c) it was held

(a) It was not the point in question, but a dictum of *Powell, J.*, which *Hall* said he had known adjudged contrary. The law, however, is clearly as in *Hambly v. Trott*.

(b) That was against the heir of the gaoler.

(c) *Dyer*, 322, a.

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that it could not be supported against the warden of the fleet. From these authorities it is evident the action cannot be maintained.

Russel, contra, merely referred the court to 1 Com. Dig. tit. *Administration*, and the authorities there, to [*125] prove *that when the ground of complaint rested on *tort*, or misfeasance, there was a remedy against the administrator.

Per Curiam. The law has been settled, both from the time of Dyer and Fitzherbert, as stated by the counsel for the defendant; judgment must, therefore, be in favor of the demurrer.

Judgment for the demurrant.(a)

THE PEOPLE *against* SHAW.

An indictment for forcible entry and detainer, must state a seizure in the prosecutor at the time of the entry, and also show an entry by the defendant. To entitle to costs on quashing an indictment, it must appear that the party traversed the indictment. This court may grant re-restitution.

THE defendant was indicted in the court below for a forcible entry and detainer, and convicted.

A writ of restitution having issued, the proceedings were brought up by *certiorari*.

(a) S. P. 1 Roll. Abr. 921; *Mason v. Dix*, W. Jones, 173; S. C. Latch, 167. But an executor may bring case against a sheriff for a false return of a levy *Williams v. Carey*, 1 Salk. 12. Though the executors of a sheriff cannot maintain case against a gaoler for an escape of prisoners committed to his custody by their testator. *Kain and others v. Ostrander*, 8 Johns. Rep. 207. See also *The People v. Gibbs*, 9 Wend. 29; *Cravath v. Plympton*, 13 Mass. R. 454.

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The indictment stated, "that Samuel Millerman, of the town of Hoasick, in the county of Rensselaer, yeoman, long since lawfully and peaceably was seized in his demesne as of fee of and in one messuage consisting of a dwelling-house with the appurtenances in Hoasick, in the county aforesaid, and (a) Cornelius Shaw of the said town of Hoasick, and county aforesaid, laborer, on the fourteenth day of instant March, at the said town of Hoasick, and county aforesaid, (b) with strong hand and armed force the said messuage or freehold aforesaid, did without law or right detain, and him the said Samuel Millerman thereof, and with strong hand and armed force, so did keep out from the said messuage, with the appurtenances aforesaid, from the said fourteenth day of inst. March, in this present year of our Lord one thousand eight hundred and one, until the day of the taking of this inquisition, with like strong hand and armed force, *did keep out, [*126] and doth yet keep out, to the great disturbance of the peace of the people of this state, and the form of the statute in such case made and provided."

Emott now moved to quash the indictment, and for a writ of restitution. He took several exceptions to the indictment, but insisted only on the sixth and seventh, which were,

6th. That it did not appear that the seisin of the said Samuel Millerman continued until the time of the alleged force.

*7th. That it was not stated in what manner, [*127] or at what time, the defendant entered on the premises, or that he entered at all."

(a) The indictment should have stated here "being so seized, one." &c.

(b) Here an entry should have been stated: "The said messuage with the appurtenances situate in the town of Hoasick aforesaid, with force and arms, and with strong hand, unlawfully did enter, and the said S. M. from the peaceable possession of the said messuage with the appurtenances then and there, with force and arms, and with strong hand, unlawfully did expel and put out" &c. See *Res v. Stort*, 3 Burr. 1898.

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He said, it was indispensable to show that the seisin of the prosecutor continued to, and at the time of, the forcible entry; whereas it was only stated he was "*long since seised*." 4 Com. Dig. tit. Forcible Entry, D. 3. D. 4. The seventh exception is fatal on the authority of 1 Hawk, 42. b. 1, c. 64, s. 40, for it must be made to appear in what time the defendant entered, or at least that he did enter, neither of which are shown.

Foot, contra. Two objections may be made to this motion. First, that as it comes before the court on *certiorari*, errors ought to have been assigned; the motion to quash is therefore improper. There is, to be sure, no express authority for this position, but it may be supported on general principles; where proceedings are removed, and a return made, the practice is to assign errors. The only ground is, that by the charge in the indictment it does not appear when the forcible entry took place. The entry is not material, the detainer is the crime; the statute is against either forcible entry or detainer, therefore unnecessary to state more than the detaining. From the nature of the transaction, and the authority being given to the magistrates, complaints of this kind must necessarily be before such as are not acquainted with forms, and, therefore, the court will not insist on a rigid adherence to them.

[*128] **Emott*, in reply. The practice now adopted is that of every day, both in this and the English courts. Because the authority in cases of this sort is given to magistrates, it is contended that no kind of forms are to be observed; the power is of a dangerous nature, and in a degree gives a right to try titles to land; this court will, therefore, keep it under strict control. The most important fact is totally omitted; the entry by force when the seisin was in Millerman. This ought to have "fully" appeared; whereas his seisin is said to have been "*long since*," and might have been discontinued. The statute is particularly

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framed against forcible entries; the detaining is only a continuation of the crime of forcible entry; for if the entry was by right, and peaceably, the defendant might be entitled to detain by force.

LEWIS, Ch. J. delivered the opinion of the court, There are two substantial and incurable defects in this indictment.

1. It doth not state that the prosecutor was seised at the time, &c. not even by implication, and this is necessary to be stated. (a) Bacon, tit. Forcible Entry and detainer, E. vol. 2. p. *561, 562, 566. Cro. Jac. 214. [*129] Sir Nicholas Poynt's Case. Ibid. 639. Bridge's Case.

2. It does not state any entry peaceable, or forcible by defendant, which must be stated; for without an entry, it does not appear but the party was in possession a sufficient length of time to justify his detaining by force. Bacon, tit. Forcible Ent. and Det. E. or vol. 2, 562, 566; Cro. Jac. 19, 20. 151. 1 Hawk. c. 64. s. 40.

From the general discretionary power this court has in

(a) But had a seisin of the prosecutor, at the time of entry, been alleged, even by implication, it would have been sufficient. *Wroth and Chapel's Case*, 3 Leon. 102, 4 Leon. 197. As if the indictment had stated that the defendant "entered, expelled and disseised" the prosecutor. *Ubi sup.* Though where it only set forth the entry, and that the defendants held out the prosecutor "disseised, expelled and ejected," the indictment was quashed, because the expulsion, &c., were not positively stated. *The King v. Dornay*, Salk. 266. A seisin must be shown though the entry be on a lessee, in which case it is stated as on the freehold of B. in the possession of A. *The Queen v. Taylor*, 7 Mod. 128. An entry on a "tenement" is too uncertain. *Wroth and Chapel's Case, ubi sup.* It must be stated to have been on the seisin of those having the legal estate. Therefore, in an indictment for a forcible entry, &c., on a church, it must show the entry, or the seisin of the legal trustees. *The People v. Runkle*, 8 Johns. Rep. 464. A *certiorari* is grantable, of course, without any special cause. *The People v. Runkle*, 8 Johns. Rep. 234.

See also *The People v. Runkle*, 9 J. R. 147; *The People v. Van Nostrand*, 9 Wen. 51; *The People v. Nelson*, 13 J. R. 340; *The People v. Reed*, 11 Wen. 51. *The People v. Godfrey*, 1 Hall. 240; *The People v. King*, 2 Cai. R. 98.

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these cases, they may set a restitution aside, and award a re-restitution (whenever it shall appear that restitution hath been illegally awarded) either for insufficiency, or defect in the indictment, or other cause, 2 Bac. For. Ent. and Det. letter G. p. 565.

I am, therefore, of opinion, the motion be granted. It was decided in this court in the case of *Reese and others* ads. *The People* (Jan. term, 1802,) that if the indictment be bad, re-restitution must follow of course; and in that case the indictment was quashed, and re-restitution awarded. But this is not within any of the statute provisions for costs, and none are recoverable. The statute (1 Rev. Laws, 104,) gives costs only when the party indicted traverses the indictment and is convicted; and no traverse is returned, or stated in the present case. (a)

The judgment of the court is, that the indictment and proceedings be set aside, and a writ of re-restitution awarded, without costs on either side.

Motion granted, without costs. (b)

(a) A traverse to an indictment for a forcible entry and detainer need not be in writing, and the defendant may be found guilty of the detainer only. When the proceedings are under the 3d section of the act, the justice assesses the damages on ordering restitution, and to give him cognizance it is not necessary that he go in person and view the force. *The People v. Anthony*. 4 Johns. Rep. 198. When he does, and under the first section records the force, the conviction upon his view is not traversable. *Mather v. Hood*. 8 Johns. Rep. 44. It is then his duty to impose a fine; and a conviction, where the party is committed till a fine be paid without imposing one, is bad. The precedent in 3 Ld. Raym. 360, is on this account faulty. It is corrected in 2 Burn's Just. 351, but see a good form in *Mather v. Hood*, *ubi sup.*

See *Fitch v. The People*, 16 J. R. 141.

(b) *Brooks v. Hunt*, 3 Caines' Rep. 128; *Jackson v. Woodworth*, *Id.* 128.

Campbell v. Munger.

CAMPBELL against MUNGER and others.

If several actions, turning on the same point, be noticed for trial, and on the hearing of the first, the judge direct a nonsuit, exception to which is taken by the counsel of the plaintiff, he shall not be liable to judgment as in case of nonsuit for not proceeding to trial on the other causes, nor be obliged to stipulate, and the costs shall abide the event of the suit.

THIS was a motion for judgment as in case of nonsuit for not proceeding to trial. The affidavit, on which it was grounded, stated, that issue was joined in January term, 1802; that the cause was duly noticed for the circuit in the same year; that it was not then tried, and was noticed again for the circuit in May last, when it was not brought on, though it was one of the oldest issues on the calendar, and no countermand of trial had been given.

Van Antwerp resisted the application, on a deposition made by himself, admitting *the notice [*130] for the last circuit, but setting forth also, that this cause, as well as another at the suit of one Elijah Montgomery against the same defendants, were actions of trespass *quare clausum*, involving the same question and same defence; that on the trial of the said cause, Montgomery was nonsuited by the direction of his honor Mr. Justice *Kent*, to which an exception was then taken, and by consent of the defendant's attorney, the making up of the case was postponed till this term; that it was understood and agreed, between the deponent and the defendant's attorney, that the decision in one of the causes should be conclusive in the others; and thereon, shortly after the trial, so as above said to have been had in the other cause, the witnesses for both parties were dismissed, and that it was very doubtful whether a trial in this present action could have been had.

Per Curiam. This is a motion for a nonsuit for not pro-

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ceeding to trial at the last circuit in Saratoga. The plaintiff's attorney thought it unnecessary, until the opinion given by the judge could be reviewed by this court, to bring on the trial of this cause; and he swears that "it was understood, and agreed, between the defendant's attorney and himself, that a decision in the cause tried should be conclusive in the other, and that, thereupon, shortly after the trial, the witnesses of both parties were dismissed."

Without relying much on the agreement of the attorneys, which was not in writing, the court think the plaintiff has accounted satisfactorily for not bringing this cause to trial. He noticed it in good faith, and appears to have been prepared to try it, but finding the opinion of the judge against him in another cause embracing the same question, and depending on the same evidence, [*131, 132, 133] it would have been folly *in him to proceed in the others until the judgment of this court could be had.[1] We think, therefore, that he ought not to stipulate, and that the costs for not proceeding to trial abide the event of the suit tried.

Judgment of nonsuit refused.

THE PEOPLE *against* RUST.

An indictment against an attorney, for extorting more than his legal fees must state the sum due, and the specific excess.

THE defendant had been convicted at the general sessions in Montgomery of extortion in his office, as an attorney of the Court of Common Pleas in that county, and sentenced to pay a fine of 100 dollars.

[1] See *Brant v. Fowler*, 2 Wend. 284; *Palmer v. Mulligan*, 2 Cal. R. 95; *Jackson v. Leggett*, 5 Wen. 83; *Sherman v. McNitt*, 2 Cow. 452.

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*The cause was brought up on a writ of error. [*184]

Emott, for the defendant, took a variety of exceptions.

1. That it is not shown with sufficient certainty before whom the court was held. The record states the indictment to have been "before the *justices of the said people*, in Montgomery aforesaid, and *assigned* to hear and determine divers felonies committed and done in the said county." But the act by which their authority is created says, "the justices of the peace of the said counties," &c., shall have power to hold the general sessions. 1 Rev. Laws, 395, s. 6. This tribunal, then, as stated, is not such a one as is created by the statute. It is a general principle, not here complied with, that particular authorities must be specifically shown. 4 Hawk. b. 2, c. 25, s. 123. That the *nature* of the commission ought to be set out and manifested, whereas here it was not apparent, and must be the result of implication alone.

2. There has been a mistrial; there is no issue joined for the jury to try: the record is cometh, &c., "and having heard the said indictment read, the said Amaziah saith he is not guilty *thereof*." This applies to the indictment, and not to the offence.

3. The time at which the court was held is stated so as to vitiate the indictment. It is said to have been on a Saturday; the first meeting ought to have been shown to have been on a Tuesday, in conformity to the act, and the continuances from thence to the Saturday, regularly set forth. The words of the act are "in the county of Montgomery, at the court-house in the said county, the Court of Common Pleas on the second Tuesdays of February, June and October, and the Court of General Sessions on the said second Tuesdays of February and October." The caption is, "at the General Sessions holden on Saturday, the fourteenth day of February." This is fatal. It is necessary to state that the sessions commenced on the day appointed *by law, and were continued [*185]

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to the day(a) at which mentioned to have been holden. For this doctrine the court may refer to *The King v. Fearnley*, 1 D. & E. 316, where, and also in *The Queen v. Shetford*, 3 Ld. Raym. 41; they will see precedents in point.

4. There is not sufficient certainty as to place. The indictment says "holden at the town of Johnstown,"(b) but the words of the act are "at the court-house in the said county." The court-house is the very spot assigned by the law, and for what appears, it may not be in Johnstown. It should have been "in the county of Montgomery, at the court-house of and for the said county, in the town of Johnstown." 4 Hawk. 77, b. 2, c. 25, s. 128, is to the same point.(c)

5. There is a total want of proper continuances. It appears by the act that the sessions are to be holden on the second Tuesdays in February and October: the continuance on the record is to Wednesday, the fourteenth day of October, on which day the *venire* is made returnable. The day appointed by law was Tuesday; and that, in 1801, was the thirteenth, and not the fourteenth of the month. It was to the Tuesday, the thirteenth, that the court ought

(a) This is necessary only in cases where the indictment, &c., is at a day without the period of the original sessions or jurisdiction. Therefore, under commissions of Oyer and Terminer, which are *pro hac vice*, if there be an indictment found after the first day, the adjournments till the day on which the indictment was taken must be shown. 2 Hale's P. C. 24. *Sampson's Case*, W. Jones, 420. So, on an indictment at an adjourned sessions, the day the original sessions began must be stated. *Rez v. Fisher*, 2 Stra. 865. But this need not be done when the sessions is by statute for a certain length of time, within which the indictment is found, as was the case here; for by the 10th section of the act of the legislature, appointing the sessions in question, they are directed to be held from the Tuesday to the next Saturday, inclusive; a continuance, therefore, would be superfluous, because the whole sessions are, in law, but as one day. *St. Andrews Holborn v. St. Clement Danes*, 2 Salk. 606. The authorities from D. & E. and Ld. Raym. do not apply.

(b) The indictment went further, and said "in and for the said county."

(c) The case there put, is of leaving out the county.

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to have been continued, and from thence to the day of trial 4 Hawk. 170, b. 2, c. 27, s. 87, 89. Ibid. s. 90. This is fatal, for a discontinuance is never aided by appearance. Ibid. s. 102.

6. The indictment is wholly defective for want of certainty. The special matter of the whole fact must be set forth with such precision, that it can sufficiently appear to the court that the indictors have not gone upon insufficient premises. Nothing material is to be taken *by intendment or implication. The indictment [*136] is laid under the fee bill, and, therefore, clearly bad, for it has not charged the fact to have been knowingly or wilfully done. These are the words of the statute, 2 Rev. Laws N. Y., 88, and are indispensable. To show that the very words of the law should be pursued, and that the court cannot, from any circumstances, or by intendment, supply the defect, there are two authorities exactly in point. *Jackson and Randall's Case*, 1 Leach, 305; *Cox's Case*, Ibid. 82. At common law this does not hold good, for *there* falsely will imply wilfully; but, under a statute, there can be no such implication. In such cases it is also necessary that the specific charge should be stated: in the present case it is necessary, not only for the sake of certainty, but because the statute declares the offence to be for taking a greater reward than it allows "for any of the services *afore said*." If the sum taken be not for the services "*aforesaid*," it is not an offence, and therefore it should be clearly stated. If the indictment be not for an excess in the money exacted for those services, it is bad. It should also have stated the party aggrieved by the crime, and for this reason; the statute is to him remedial, and gives *him* treble damages. A further defect is, that the judgment does not follow the act. The law ordains that the culprit "shall pay to the party grieved treble damages, and such fine to the people of the state of New York, as the court shall think proper to impose." The sentence is only for a fine; totally omitting the treble damages to the party grieved, for whose

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compensation the act was principally intended. Under the statute for the prevention and punishment of extortion, (1 Rev. Laws N. Y., 120,) the indictment can as little be supported. An attorney is not an officer within that law. An officer is an agent for the public, an attorney is only a private agent. If, however, he is an officer, then it was necessary to lay the offence as done by color of his office, and for doing his office. This is an objection even at common law, for there it must be charged *colore officii*. *Bains's Case*, 6 Mod. 193. Nor does it appear that the money was taken in the cause; if it was, it might not have been for costs.

The charge, therefore, wants legal precision. *The* [*187] **Queen v. The Clerk of the Peace of Cumberland*, 11 Mod. 82. In that case it was laid as here, (a) and Lord *Holt* held it insufficient. That it must be so, is evident from this, that it is necessary to show how much was due. This is not done, and on that account therefore, the indictment must fall. *Lake's Case*, 3 Leon. 268; Com. Dig. Extortion, C. *Baynes's Case*, 2 Salk. 680; 1 Holt, 512, 517. *The Queen v. Clerk of Cumberland*, 11 Mod. 80, 83.

Metcalf, District Attorney, contra. The first objection that has been taken, is to the caption, in omitting, after the word "justices," to add "of the peace." This exception, it is presumed, cannot be supported. On considering the nature of the offence, and how it became cognizable before the sessions, the jurisdiction will appear to have been sufficiently set out. The clause is descriptive of their sessions jurisdiction, and that was the only one they were then exercising. What are now called justices of the peace, assigned, &c., were originally no more than conservators of the peace, and chosen by the people. By 1 Edw. III. c. 16, they were made officers of the crown, but still nothing more than conservators, as they antecedently were. It was not till the 34th Edw. III. c. 1, that they obtained their power

(a) The indictment there charged him with "extortion, viz: that he exacted and forced from such person more than his just fees."

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to hear and determine, &c. It is from hence that all their sessions power was derived, and independent of that act they had not power to try. 1 Black. Comm. 349-354. As then, the authority of justices does not enable them to hear and determine, &c., and this authority is the only one by which they have cognizance of the offence in the indictment, it comprehends all their sessions power on the point in question, and to state *that* is fully sufficient. It is not necessary to state more than will give jurisdiction over the offence. Suppose any other subsequent authority had been conferred, would it have been incumbent to set forth *that*? The words of the caption are, "assigned to hear and determine divers felonies, trespasses and other misdemeanors;" this, then, is a competent description of the persons before whom the indictment was tried. It states their mode of creation, and the jurisdiction of the particular *offence to have been delegated. The book referred to, (Hawk. b. 2, c. 25, s. 123, p. 360,) does not make good the exception. There is no case decided that in an indictment at the sessions it is material to insert "*assigned to keep the peace*." This power is distinct from that to try, and, therefore, on a case under the latter, the former need not be specified.

In answer to the second objection that the issue was not properly joined, and therefore a mistrial, it is useless to argue. Three precedents (and all others it is presumed are the same way) sufficiently prove that the due forms of law have been observed. Cro. Cir. Comp. 83.(a) Trem. P. C. 8vo. translated edition, 117; Ibid. 133.

As to the want of certainty in not setting forth the specific charge, and the fee due, this general principle may be replied. It is necessary only that the charge contain the manner and substance of the fact. Hawk. b. 2, c. 25, s. 54-68. The indictment does do all this, and when compared with others will be found to contain as much certainty as

(a) In the seventh edition the precedents are from 353 to 360, inclusive.

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is common. It sets forth the person, time, place, sum taken, manner, occasion and intent. But it is asserted, the party injured is not set forth. The reverse of this we contend to be the fact. Mention is made of the suit, specifying the time when judgment was obtained, naming the parties plaintiff and defendants; that Rust conducted it as an attorney for the plaintiff, and received so much money over and above what was due. This, then, is a sufficient description of the person from whom received, and the party aggrieved. The offence is stated to be that the eleven dollars were extorsively "exacted, demanded, extorted and received over and above his fees." For this an authority may be found in Hawk. b. 2, c. 25, s. 57. It is there said an indictment for extortion, charging a bailiff of a hundred with taking *colore officii* fifty shillings, is good, without showing for what he took it; especially after verdict.

The law never can intend that every circumstance, whether it go to the charge or not, shall be enumerated. Those only are requisite which are connected with the crime; such as to make up the offence. Here he is charged with taking more than due. It is not necessary to go [*139] into a calculation and state each sum. This may be necessary to be shown to a jury, but not to appear on a record. All the cases in Hawkins turn on the principle stated, and leave out indifferent matters, specifying only those that constitute the offence, and without which the prisoner would have been innocent. To the same effect is 4 Com. Dig. 391. G. Certainty to a general intent is sufficient. The same in *Rex v. Brunsden*, Cro. Car. 438; S. C. 448. To a general indictment against a sheriff's officer, charging him with having taken twenty shillings, many exceptions were taken, but on this point not one. *Rex v. Cover*, 1 Sid. 91. S. C. 1 Keb. 357, the case cited from Hawkins. The court will find the same doctrine in 11 Vin. Abr. 471, pl. 4. 14 Vin. Abr. 863. pl. 8. n. *Rex v. Cover*. *Rex v. Reffit*, 7 Mod. 220. But should it even be admitted that the charge is insufficiently made

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after a verdict it is too late to be insisted on. Every circumstance that might have been fatal on demurrer cannot be taken advantage of after trial and conviction. A verdict cures many defects; and particularly those which must have been removed before the party could have been found guilty. *Rex v. Cover*, cited in 3 Bac. Abr. 554. No authority has been adduced to show that it is necessary to set forth the specific charge. There is no book which will warrant it, and it is repugnant to the cases of *Rex v. Brun-den* and *Rex v. Cover*. If they are law, the exception is good for nothing. Besides, the overcharge might be a sum in gross; for a regular bill might be made out for 25 dollars, and 30 be received. This will evince that it might be impossible to point out the identical charge in which he was guilty of extorting. As to not stating the due fee, this has ever been considered as an immaterial allegation; it is only a circumstance attached to the offence, and it is enough if it appear in evidence. But though the omission be a defect, it is cured by the verdict. The case in 3 Leon. 268 (*Lakes Case*) is the only one that can be found to maintain the exception. It seems, however, to have turned altogether on the words of a particular statute; that of 25 Edw. III. c. 9. made against clergymen who took more than their fee for giving absolution. By looking at the act it will be found to have required a more than ordinary degree of *certainty in the proceedings, [*140] and the court probably felt themselves under its influence. That the statute demanded a greater precision than the common law must necessarily be inferred from its being passed; for had it been otherwise, it never would have been enacted. This is evident from the decision in *Rex v. Reffit* and *Pott's Case*. In those a verdict was had on a general indictment, like the present, and the court held it well, saying they could not then go into the exception. In *Rex v. Baines*, as appears by Holt's report of it, 512, there was no determination on the point now objected. It was an indictment for taking eight shillings for a sub-

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pœna of only twelve lines. The charge was "for divers misdemeanors in the execution of his office in the articles following, viz." So that the offences were laid under a *videlicet*, and a mere recital. Holt said that it was not charged for what fees, whether as clerk, or in what capacity; it was alleged to have been done in the execution of his office. Powell, one of the judges who was against the articles, mentioned the case in 3 Leon. but the other judge took no notice of it, and it does not appear to have been at all rested upon. The court will never require impossibilities. If this objection should prevail, in many instances an attorney could never be indicted. Suppose he should refuse a copy of his bill and destroy it. To be sure the court might order a copy to be produced: but then, no other than the party injured could call upon him; so that this would confine the proceedings to the person injured, and lessen the generality of the remedy. What if the attorney choose to be in contempt? He would put himself beyond the ordinary course of law. In *Rex v. Reffit*, and *Rex v. Cover*, a fee was due for one of the services; it was not set out, and yet the conviction deemed good. For if stated it would not enable the court to form a better judgment of the nature of the offence; it would give them no greater information than they now have; unless every specific service is to be charged, then what was due, and then what was received. The objection is not now tenable; for though it might have been good on demurrer, it is cured by the verdict, the inference being that all the facts were proved.

[*141] From whence the conclusion must be that he *extorted, and this word is used in the charge. But, if these objections be done away, it is still urged that we have not laid it to have been done under color of his office, and that the money is not stated to have been received in the cause, or for fees. This latter exception is not true in fact. The indictment sets it forth with all convenient, though not with all possible, certainty. It states the suit that Rust was the attorney for the plaintiff; that being so,

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and while prosecuting the suit for the plaintiff as *such* attorney, he extorted from one of the defendants eleven dollars more than were due in the suit, and more than were due to him, and the other officers and ministers of the court, for their respective services in the said suit. This, therefore, is substantially good. 1 Trem. 8vo. ed. of English translation, 115. 4 Went. Plead. 146.(a) *Colore officii*, though inserted in the precedents in one or two reports, may be dispensed with. If it appear that the party charged with the offence was acting in his office, it is sufficient. In the part of Hawkins relied on, b. 2, c. 25, s. 57, after enumerating the technical terms that could not be omitted, it does not say that *colore officii* is indispensable. *Rex v Baines* states the objection, but it was not acceded to. The indictment says that he was acting as an attorney; this is fully enough. As to the argument that the proceedings are not good under either of the acts of the legislature, it may be very briefly answered, that it is immaterial whether it be so or not, if good at common law: to which its conclusion against the peace, &c. cannot be objected. The whole tenor of the indictment shows the money was taken by color of his office. It is doubted, however, whether an attorney be such an officer as is intended by the act of the 7th January, 1788, "for prevention and punishment of extortion." Attorneys are always stated to be officers of the court, and taken to be ministerial officers. They are licensed, regulated, and liable to punishment by the court, and therefore creatures of it. The act mentions sheriff, or other officer whatsoever, ministerial or judicial; if, then, an attorney be an officer, the indictment will be good under that law, because the words knowingly and wilfully are not in it. The *fee bill (2 Rev. Laws, 88,) has these terms. It [*142] is not denied but that the indictment would have been more formal had it contained these words; yet in

(a) The extortion was under pretence of getting a discharge, not under color of office; therefore, could not be so laid.

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Hawk. b. 2, c. 25, s. 96, it is mentioned that if a statute contain the word unlawfully, you must use it; or some other tantamount. Therefore, it is not necessary to use every adjective the act may contain. The words of the indictment, and those of the law, when compared, will be found to be co-significant. The question then is, whether the words, taken collectively, do not sufficiently indicate that the money was received knowingly and wilfully? whether they do not import as much? This, however, is a public statute, and it is not necessary to recite it. This principle is equally applicable whether the fact charged be prohibited by one or more statutes. The averment, therefore, against the form of the statute is *ex abundanti*; and not fatal. Two words are also said to be omitted, which are essential to the description of the offence of extortion: At common law these words are not required. This is a misdemeanor, not originating on any statute; it is the old common law offence; the words of the statute only show what would be extortion, and the court will please to observe that *colore officii* can apply only where no fee is allowed at all; which is a different species of extortion from the present. That the judgment ought to have been for treble damages can be enforced as an argument against the proceedings only if they be deemed to be on the statute, but if held to be at common law, it cannot prevail. The authority cited on the opposite side from Cro. Car. 448, is in point to this, though it has been mistaken by the party by whom used. Another reference may be made to show an exception cannot be taken for not giving damages. 2 Stra. 1048, (a) "*quod convictus est*," was adjudged enough, because every thing the law ordains is implied and results from the words; but what rests in discretion must be inserted. Nor is it necessary, though the act order fine and imprisonment, that both should be inflicted; its being a fine only, does not vi-

(a) It is supposed *Rex v. Luckin* is the case alluded to. It does not, however seem perfectly analogous.

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tiate. In *General Gordon's Case* the same thing was determined by this court.

*There is no authority to support the objection [*143] on account of omitting to say "at the court-house;" and that which is taken against the continuances is equally untenable. The sessions may adjourn to any day within the sessions in the same manner as they may make their process returnable; in conformity to which the continuance to the *venire* is so made. That the party aggrieved is not mentioned has already been answered, and of this the whole indictment is a complete refutation. If this indictment prevail, deleterious consequences; it is said, will ensue, and that indictments can be thus preferred will be a doctrine dangerous to the profession. There is no man, continued the district attorney, who more wishes its well being than myself, but neither its interest nor its honor require that practices like these should go unpunished. The court, therefore, though called on to require more certainty in this indictment than any other, cannot be influenced by the considerations suggested; it is not by law necessary, and that is sufficient.

Emott, in reply. The court will perceive that the charge may affect the defendant most seriously; it is not only the fine he has to pay, but it may go to striking him off the rolls, and depriving him of the means of subsistence. The sum does not induce him to come here, but, that he might have the means of support. The indictment is not pretended to have been framed on a bill of Rust's, but on an estimate made by the parties who met together, calculating what he ought to have received, and then, because in their opinion he had taken too much, they proceed in this rigorous manner. It perhaps would have been full as effectual for the purposes of justice if they had left the punishment to the court of which he is an attorney. Two kind of errors are insisted upon. One goes to the form, and *that*, we contend, is materially defective. This, an inspection of the

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record and authorities will prove. From Hawk. b. 2, c. 25, s. 123, and the cases there cited, two general rules may be drawn. That the nature of the commission ought to be set forth, and the authority to hold the court apparent on the record. It is not stated that the justices were of the peace for the county. Therefore, notwithstanding [*144] Blackstone, when we look at our law, we *find they must be of justices of the peace *for* the county. If you pursue the words of the indictment, the same want of precision is continued. Before Abraham, &c., and others, "justices of the said people *in* the county of Montgomery aforesaid." There is a wide difference between justices *in* and justices *of* a county. Suppose a magistrate from another county to go there, he would be a justice *in*, (a) but not *of* Montgomery, and could not have a right to be one of the sessions of that county. It does not follow that they are the right justices, because styled justices of the people. (b) The justices of this court are justices of the people, but they could not go to Montgomery and hold the sessions. Nor is this cured by its being stated "assigned to hear," &c., for if there was a special commission to try particular offences, they would under *that* be *assigned* to hear, and have authority to hear and determine *according to their commission*, but *not as justices of the peace of the county*. No answer has been made to the exception against the time at which the court was holden; it should have been shown that the court was holden on the Tuesday, and then adjourned; this not being done, the omission is material and not cured. *Rex v. Warre*, 2 Stra. 698. (c) As to place there is a total failure. The act fixing the place at which

(a) In this the learned counsel is mistaken: a justice of the peace, in the eye of the law, is a justice only in his own county.

(b) *Wightman v. Mullens*, 2 Stra. 1226. "One of the king's justices does not import one of the justices of K. B., for every justice of the peace is a justice of the king."

(c) That was an indictment stated to be held "*ad festum Epiphaniæ*" instead of *Epiphaniæ*, and in the Roman calendar there is a saint *Epiphanius*.

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the sessions are to be held, does not notice Johnstown; it mentions the court-house of the county: the location of that was a private law; it ought, then, to have appeared that the court-house was at Johnstown, that the sessions were held there, and not elsewhere; for, if the sessions were at Johnstown, and the court-house in any other town, the court could have no authority. Another idea presents itself respecting the adjournment; suppose it had gone beyond the week in which the second Tuesday fell, there would doubtless be a want of due continuances, and the contrary does not appear now.^(a) The court will recollect that this indictment was not necessary for the ends of justice, as the court of which Rust is an attorney, is competent to every purpose for which it can be asked. The fee bill creates the offence, and from *Jackson and Randall's Case*, and *Cox's Case*, before *cited, it is indispen- [*145] sible to pursue the words of the statute, "*knowingly and wilfully*." The very charge must be specifically stated, for it is only in overcharges of a particular nature, mentioned by the act, that the offence is comprehended. The words of the law are, "*the sum of money herein before allowed*." If, then, not in one of the sums before allowed, it is not an offence within the act. It might be an overcharge for a letter. Admitting the demand to be unreasonable, it is possible it was not within those mentioned by the fee bill. If it was, then the conviction is clearly bad for the court should have gone on to give treble damages.^(b) They are the first object of the law, as a compensation to the party aggrieved; the fine alone is a matter of discretion; the words are, "and such fine to the people of the state of New-York, as the court, &c., shall think proper." So by color of his office, is equally necessary under the other act, for the words of the law have made it a consti-

(a) The act being a public act, the judges are bound to notice the time, it being laid within the period ordained.

(b) *Quare*, if this is to be done without action and trial by jury. *Bumpsted's Case*, Cro Car. 448. *Rex v. Lamforne, W. Jones*, 379.

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tuent part of the offence; but it is conceived that attorneys are not either ministerial or judicial officers, within the meaning of that law. If the proceedings are to be taken at common law, then it is indispensable that *colore officii* should be expressed. *Baines's Case* is full to this. The manner of stating the charge really amounts to nothing. That he extorted "eleven dollars over and above the fees usually paid for such like services, and due in the suit aforesaid, and more than was legally due to the said Amaziah Rust and the other officers and ministers of the said court, for their respective services in the said suit," *over and above the fees usually paid*; this does not say they were received in the cause, but only that they were received from one of the defendants. Should, however, the court imply the money was received in the cause, it does not appear to have been for costs: there is not a word to show it. The excess might have been for a part of the debt. If the court adopt the common presumption that he was acting in good faith, though too much has been taken, it will not be supposed for fees; especially as they are stated not to be due, and the debt not alleged to have been paid.

Nay, suppose the judgment had been long stand-
[*146] ing, the eleven dollars *might be for interest. It

is possible this *extra* sum might have been received, every word of the indictment in that respect true, and yet the defendant not guilty of extortion. He may have paid to another person; the sheriff may have demanded it; a thousand cases might be put to show the want of precision. The proceedings mention *such like services*, without stating any before.

Metcalf. It sets forth that he obtained a judgment.

Emott. Allowed; but that is not material. In 11 Mod. *The Queen v. Clerk of Cumberland*, the same observation was made by Holt. He says, "he took ten shillings more than his fee; why this may be, for perhaps he had another

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demand upon him;" and the indictment held not good. The authority in 3 Leon., requiring the sum actually due to be specified, is acknowledged by the district attorney to be against him. The case in Holt is full for the purpose cited; the exceptions being confirmed by reason and settled adjudications, are well taken, and the indictment never can stand.

Our. ad. vult.

RADCLIFF, J. now delivered the opinion of the court. This is a case on error, from the sessions in Montgomery. The plaintiff was indicted in the sessions for extortion, as an attorney of the court of common pleas for that county. General errors have been assigned, and a number of objections taken to the indictment and to the record, some of which are objections of form, and others of substance.

For the purpose of the opinion we shall give, it will be sufficient to state the part of the indictment on which it is founded, and which we deem to be defective in substance.

The indictment states, that he was an attorney of the court, &c. and that on the 12th of February, 1709, he obtained a judgment in favor of one *Ichabod Roberts v. Alexander Campbell and John Hamilton, jun.* and that he did extort and receive from the said *Alexander, eleven dollars over and above the fees usually paid for such like services, and due in the suit aforesaid, and more than was legally due to him and the other officers and ministers of the said court, for their respective services in the said suit, &c.*

The fact thus charged may be true, and the plaintiff may still be innocent of the offence. The indictment does not *specify how much was received on his [*147] own account, and how much for the officers and members of the court. It may be that the excess, on which the charge of extortion depended, was occasioned by the charges made by the other officers, and incorporated into his bill, as for *sheriff's fees, clerk's and witnesses, &c.* In these respects the indictment is not sufficiently particular; the offence is not alleged with sufficient precision and cer

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tainty ; therefore, without examining the other objections, we are of opinion, that for this cause the judgment ought to be reversed.

Judgment of reversal.

LEWIS Ch. J. absent.

COMBS against WYCKOFF.

If a party to a suit referred, cannot produce his witnesses by the time of hearing, a judge at chambers in vacation, or the court, if sitting, will stay proceedings. Defendant's attorney having nominated referees, and the party not having objected, he cannot, on that ground, move to set aside a report. The court will not notice any agreement in a cause between the attorneys, unless reduced to writing.

THIS was an action for damages in not delivering a boat alleged to have been purchased by the plaintiff.

Woods moved to set aside the report of the referees on an affidavit by the attorney in the cause, stating that the witnesses of the defendant were seafaring men ; that there had been an express agreement between the deponent and the plaintiff's attorney, that the referees should not make up their report until the testimony on the part of the defendant could be obtained ; yet, notwithstanding this agreement, the referees had reported without waiting for the evidence on which the defendant relied ; that a sum had been allowed the plaintiff for a loss, said to have been sustained by not being enabled to carry a quantity of wood to New-York, though it was proved, and even admitted, that a part of the wood was previously sold by the plaintiff ; and the residue might have been conveyed to New-York had he thought fit ; that the referees were nominated by the deponent without the knowledge of the defendant, between whom and one of them a quarrel had taken place, which was not made up ; that by the next circuit the defendant hoped to be able to procure testimony which would at least diminish the damages against him.

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Skinner, contra, read his own deposition setting forth that he did not recollect the agreement above mentioned, and that at least it was not in writing; that the referees met several times, and were as often adjourned at the request of the defendant's attorney under the pretence of not being *able to procure the attendance [*148] of his witnesses; that at the last meeting the defendant's attorney declined summing up, and so far from any enmity existing between the defendant and one of his referees, the very party named as being inimical was his special bail.

LIVINGSTON, J. delivered the opinion of the court. The defendant moves to set aside the report of referees, alleging,

1. That it was agreed by the plaintiff's attorney, that no report should be made until the defendant's witnesses could be procured, which was afterwards disregarded.

This agreement not being in writing, and being denied by the plaintiff's attorney, must be laid out of sight. The court cannot too frequently inculcate the necessity of reducing to writing all agreements between gentlemen of the bar.(a) Many mistakes, much misunderstanding and controversy will by this measure be avoided. In the present case it appears that two months elapsed before the report was made, which was allowing sufficient time for the defendant to produce his witnesses. If they were abroad, he might have applied to the court (for a term intervened between the appointment and report of the referees) for an order on them not to proceed for a reasonable time,(b) which

(a) *S. P. Bain v. Green*, 2 Caines' Rep. 95. *Brandt v. Berran*, 3 Caines' Rep. 131. *Parker v. Root*, 7 Johns. Rep. 320. The rule extends to parties in the suit; *Shadwick v. Phillips*, 3 Caines' Rep. 129, and though the agreement be admitted, the rule will be enforced, unless expressly waived. 2 Caines' R. 95. 3 Caines' R. 131. See also *Griswold v. Lawrence*, 1 J. R. 507.

(b) *S. P. Sands* ad. *Bird and others*, Col. Cases, 105.

See as to adjournment before referees; *Jackson v. Ives*, 22 Wend. 637; *Ex parte Rutler*, 3 Hill, 464; *Graham v. Morton*, 6 Wend. 552; *Langley v.*

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would have been granted, or a judge at his chambers would have ordered the proceedings to stay until application should be made to the court (a)

2. Another objection is, that a sum was allowed, which was not proved to be due. Of this allegation there is no satisfactory proof, and therefore we can take no notice of it.

3. A third objection is, an emnity between the defendant and one of the referees.

This reference, it is observed, was on a nomination by the defendant's attorney, and although he might have been ignorant of the quarrel spoken of, the defendant by his acquiescence in the appointment, and submitting the cause to his decision, cannot now avail himself of this challenge. He should have applied to the court to remove him and appoint another. (b) It is somewhat remarkable, however, that the referee who is repugnant or hostile to the defendant, should be his special bail in this very cause.

[*149] *4. The defendant states that "he can now introduce evidence to diminish at least the damages reported." This is very loose, to say the least. Why was not this testimony obtained before? and to what extent will the damages be reduced, if it be offered now? Will it justify a diminution of only one dollar, or less? If so "*de minimis non curat lex*," and if the discovery had been made even prior to the report it would be no reason for

Hickman, 1 Sand. 681; *Cleveland v. Hunter*, 1 Wen. 104; *Sudam v. Swart*, 20 J. R. 476.

(a) When a report was made without giving time to adduce testimony in proof of items agreed to be admitted, but at the meeting refused to be allowed, the court set aside the report, though the agreement was by parol. *Forbes v. Tracy & Tracy*, *Caines' Prac.* 495. S. C. by the name of *Forbes v. Tracy and another*, 2 Johns. Cases, 224.

(b) It has been since ruled that when parties elect to act for themselves in the nomination of referees, without the intervention of the court, a motion to set aside the report will not be heard, *Miller & Underhill v. Vaughan*, 1 Johns. Rep. 315, though accompanied by an affidavit of merits. *Stephens v. Beck* v. *ibid.* 492.

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disturbing it. Let the defendant take nothing by his motion, and pay the costs of this application.

Motion denied, with costs.(a)

THE PEOPLE *against* CROSWELL.

If an indictment be removed from the sessions into this court, any exceptions may be taken to the charge of the judge by making a case, and bringing it before the court, in the same manner as in civil proceedings.

THE defendant had been convicted at the last circuit, for the county of Columbia, before *Lewis*, Ch. J. on an indictment for a libel on the President of the United States. The proceedings were originally commenced before the justices in the general sessions, from whence they were removed into this court, and went down to the circuit in the usual manner. On conviction of the defendant, recognizances were taken for his appearance the first day of term to receive judgment, but his counsel, considering the chief justice to have totally misdirected the jury, were rather at a loss how to bring the matter before this court.

The Court said, that on the cause being brought up and sent down to the circuit, the suit, though in its nature a criminal prosecution, took the course of a civil action; that within the first four days of the term ensuing the conviction, a motion in arrest of judgment might be made, or the parties may make a case, and bring every thing fully be-

(a) A motion to set aside a report of referees ought to be made in the term next after the report, *Comstock v. Rathbone*, 1 Johns Rep. 138, and when on the merits, is an enumerated motion. *Clinton v. Elmendorf*, 3 Johns. Rep. 143. Note, the marginal statement of this case in the report is right, that in the index wrong. See the point as ruled above. *Caines' Prao.* 494. Though it is not necessary that the report should have been filed, provided it has been delivered to the party who urges that as an objection. *Thompson v. Tompkins*, 1 Johns. Cases. 238

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fore the court. This measure they advised, as being in the present instance more explicit, and it being adopted, they gave day till the fourth day of next term, taking recognizances from the defendant and two others for his due appearance, himself in 500 dollars, his sureties in 250 dollars each.

LUSHER *against* WALTON.

Notice to refer must contain the names of referees. Misapprehension of a rule, or ignorance of a late determination, may be offered as excuses for not noticing for the first day of term. If the ground of opposing a reference be that a point of law will arise, it ought to be stated expressly what, and that it is "as advised by counsel."

VAN VECHTEN. This is a motion for a rule to refer. The affidavit states that there are long accounts to adjust.

[*150] *Emott*. The notice does not mention *the names of the referees; from *Bedle v. Willet*, ante 7, decided last term, this is necessary.

Per Curiam. If the cause contains long accounts you cannot try it.

Spencer observed to the court, that a cause could not be referred at the circuit;(a) but from the case cited, the application might be renewed the next non-enumerated day.

Emott. If the court say they will hear it, I shall waive the objection.

Per Curiam. The omission must be accounted for, and therefore we cannot say we will hear it. All notices must be for the first day; see ante, 73, n. (b), if not, an excuse

(a) A rule for that purpose is a nullity. *Williams v. Green*, 3 Calnes' Rep. 129.

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must be offered. But a party's misapprehending a rule has frequently been received as an excuse. The decision quoted has altered the former practice, and if the party will swear he did not know it, he may apply again

Emott, waiving his objection as to the omission of the names, opposed the rule on a deposition by the plaintiff stating that an account between him and the defendant had been long ago settled, on which there appeared a certain balance due, for which the present action was brought, and that he believed the matter in dispute involved points of law.

Per Curiam. From the plaintiff's affidavit it does not appear there was a final closure of accounts, (a) so as to entitle to oppose the rule; besides, there are two affidavits against him; the weight of evidence must, therefore, preponderate, and his single affidavit must give way. His second ground for resisting the application is, that on the examination questions of law will arise. This, if properly stated, would have been a good reason for denying the rule; [1] but on that point the affidavit is defective: it states his information and belief that it will arise; it ought to have said that "he is advised by his counsel," and even then to have set forth the particular and specific point, to satisfy us that it did exist. For these reasons, therefore, as the first taken objection *is waived, [*151] the plaintiff's affidavit is insufficient, and the defendant must take his rule.

Motion granted. (b)

LEWIS, Ch. J., absent.

[1] Code of Procedure, sec. 271: *DeHart v. Covenhoven*, 2 J. C. 402; *Adams v. Bayles*, 2 J. R. 374; *Anon.* 5 Cow. 423.

(a) See *Cochrane & Ludlows v. Hacker* 2 Caines' Rep. 251. *Hobson & Thid v. Seymour*, Caines' Prac. 486.

(b) In *Low v. Hallet*, 3 Caines' Rep. 82, the court thought "as advised by counsel" equivalent to a specification of the points of law that would arise. In *Adams v. Bayles*, 2 Johns. Rep. 374, from the report, and in which it is to be observed the opposition was by the reporter himself, neither the points

 Jackson v. M'EvoY.

JACKSON, on the demise of WINTER, *against* M'EVOY,
tenant in possession:

In order to be admitted as a defendant in ejectment, a privity must be shown between the applicant and tenant. It is not enough for the party applying to swear he claims title, and has a real and substantial defence.

WOODS applied to vacate the judgment entered against the casual ejector, and to admit Henry Masterton to be made defendant, on such terms as the court might be pleased to order.

The affidavit of Masterton set forth that the suit was instituted to recover possession of forty-five acres of land in the county of West Chester, to which he claimed title, and has a *real and substantial defence to make*; that, on the 26th day of July last, the deponent discovered in the book of common rules of this court, that a rule for judgment against the casual ejector has been entered in the above cause, on the 12th day of May preceding; that the tenant in possession never informed the deponent of any declaration in the said suit having been served upon him, till a long time after the rule for judgment had been entered; that the deponent believed the knowledge of it was withheld from him, owing to a good understanding between the lessor of the plaintiff and the tenant in possession, to prevent *that* defence being made which the lessor of the plaintiff was, previous to the commencement of the above suit, told by the deponent he would make, and that on search he finds no record has been filed in the above cause.

These facts and allegations, he contended, were tanta-

of law, nor advice of counsel, were stated by the affidavit. In *Salsbury v. Scott*, 6 Johns. Rep. 329; the court seem to have fully adopted the principle of this decision as to the form of the affidavit to oppose a reference. It is true that in *Low v. Hallett*, in addition to the words "as advised by counsel," the affidavit contained those of "and verily believed." Whether these minute diversities will reconcile the decisions, the reader will judge. See the conclusion of note (a), p. 157. See also *Shaw v. Ayres*, 4 Cow. 52.

 Jackson v. M'Evoy.

mount to a positive assertion of title; that it was impossible without one to have a real and substantial defence. That nothing would be lost by the plaintiff, as a trial might be had at the circuit in September. That the question would then fairly come up whether the deponent or Winter was really entitled.

RADCLIFF, J. There does not appear to be any relation between Masterton and the tenant.

Woods. Perhaps the affidavit does not go quite far enough in stating that expressly, but surely it may well be gathered from the whole.

**Emott, contra.* The deponent does not swear [*152] to any title; he only says he has a claim; he does not swear that he is the landlord; not even that there is a privity between him and the tenant. If, then, there is no title, if he is not landlord, and if there is no privity, how can he be made a defendant? If a man may thus come in and vacate a judgment, without any complaint from the tenant, there is not one which may not be set aside. There is nothing stated which shows that notice of the ejectment ought to have been given to the deponent. The tenant is not obliged to hunt out all persons who have claims; he can only be expected to communicate to his privies.

Per Curiam. The party can take nothing by his motion.
Motion denied.(a)

LEWIS, Ch. J., absent.

(a) The claim of the landlord to defend, is thought to be by statute. 1 Rev. Laws, 145, s. 30. Lord Holt says it is of right, *Fenwick's Case*, 1 Salk. 257, but though before the statute a landlord might have been let in to defend, the second provision of the section seems new. It has been determined that neither a devisee, where the ejectment is by the heir, nor a mortgagee, who has never received rent, Bull N. P. 95, nor a *cestui que trust*, who has never been in possession, *Loveloock v. Doncaster*, 3 D. & E. 783, are landlords within the statute; that a devisee in trust, *Norris v. Doncaster*, 4 D. & E. 122, a mortgagee, *Doe v. Cooper*, 8 D. & E. 645, though the report does not say he had ever received rent, and a lord claiming by cash, *Fairclain v. Shamhille*, 3 Burr. 1290, are landlords within. From this last

 Jackson v. Brown.

JACKSON, on the demise of RODMAN, *against* BROWN.

The sudden indisposition of counsel and attorney, is an excuse for not proceeding to trial, but will not exempt from costs.

SPENCER moved for judgment as in case of nonsuit, for not proceeding to trial. The notice was served on the first day of term, for argument on this. The affidavit accounted for its not being noticed for the first day, by stating that it had been delivered, on the 26th of July, to a person who was then about leaving Hudson for Albany, but who had either lost it, or left it behind with some papers of his own.

Van Vechten opposed the motion, by an affidavit of the indisposition of both attorney and counsel in the cause, when too late to employ others.

The cause was countermanded, but, after the circuit, began.

Per Curiam. The excuse is sufficient to prevent granting the judgment applied for, (a) but the plaintiff must pay the costs of not proceeding to trial. It was a misfortune, it is true, that the parties should have been afflicted with sickness, but it is a misfortune that ought not to fall on the defendant.

Motion denied on paying costs.

LEWIS, Ch. J., absent.

cited case, it would seem, that all who stand behind the tenant may come in to defend for their own interests. See *Jackson, ex dem. Cantine and others, v. Stiles*, (George Clark, tenant,) 4 Johns. Rep. 493, as to admitting alien landlords.

Sliten v. Jackson, 1 Wend. Rep. 316; 6 Cow. 589; 5 Id. 447; *Jackson v. Finl*, 2 Cow. 594; 11 Johns. Rep. 407; *Jackson v. Babcock*, 17 Johns. Rep. 112; N. Y. Code, s. 122.

(a) *Rogers v. Harrison*, 2 Gaines' Rep. 379. *Steinback v. Hallett*, 1 Johns. Rep. 141.

Alexander v. Esten.—Jackson v. Marsh.

ALEXANDER *against* ESTEN, Administrator.

A motion cannot be extended to objects not specified in the notice.

THE COURT ruled that it was the practice to confine a party *to the objects specified in his [*153] notice, and the present being to set aside an execution, they would not allow it to be extended to the judgment.[1]

LEWIS, Ch. J., absent.

JACKSON, on the demise of WATSON, *against* MARSH.

Nine days' notice is enough to produce in Cayuga papers in Albany, 180 miles distant.

W. WOODS moved, on the common affidavit, for judgment as in case of nonsuit for not proceeding to trial.

Emott resisted it on an affidavit, setting forth that the cause was duly noticed for Cayuga county; but, nine days before the trial, the defendant served a notice to produce papers which were in Albany.

He also stated some circumstances tending to show tricking practice, but nothing of that sort appeared by the affidavit.

COURT. What is the distance from the county court in Cayuga to Albany?

Emott. One hundred and eighty miles.

[1] *Fergus v. Jones*, 12 Wend. 241; 1 Cow. 135, note [1].

 Webb v. Wilkie.

Per Curiam. The plaintiff must stipulate and pay costs. There is no proof of want of time.

On stipulating and paying costs,
Judgment of nonsuit refused.

LEWIS, Ch. J., absent.

 WEBB against WILKIE.

Whenever a plaintiff amends his declaration, the defendant has an election to plead *de novo*.

THIS was an action on a sealed note, dated on the thirtieth of the month. The declaration stated the date to be the thirteenth.

Emott, on the first day of term, had obtained a rule to amend the declaration by striking out the word "thirteenth," and inserting the word "thirtieth." No person appearing to oppose, the motion was granted of course and without imposing terms.

Van Vechten now applied to vacate that rule, and that it be ordered that the amendment be on the usual terms. This, he said, was necessary, because the plea of *non est factum*, which was then proper, might now be highly the reverse.^(a) The court was always disposed to set things

(a) These are, that the defendant be at liberty to abide by his plea, or to plead *de novo*, *Bovert and M'Donald*, Caines' Prac. 120, in which case he is entitled to an imparlance, *Holmes and another v. Lansing*, Cole. Cas. 92, and costs up to the time of plea pleaded. So if he relinquish his defence, he is entitled to costs. *Wingate and another v. M'Dougal*, Cole. Cas. 49. See *Jackson v. Kough*, post, 251.

See Code of Procedure, secs. 172, 173.

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right, if it lay in their power. They never could mean that the plaintiff, who had been guilty of a mistake in his declaration, should have liberty to amend *that*, and the defendant be held to a plea that might be inapplicable. Besides, there was ample time to give a [*154] plea before the next circuit, and surely the court will not shut out the defendant from pleading *de novo* when his first plea was the result of the plaintiff's misstatement.

Per Curiam. Let the former rule be vacated, and the plaintiff amend on the usual terms.

Motion granted.

GILLILAND against MORRELL.

All irregularities are waived by a defendant if he appear on trial. On judgment for non-suit, the defendant should make a demand of his costs, with a copy of his rule annexed; and if not paid in 30 days, he may take his judgment; if he do not so, the plaintiff will be regular in acting for trial.

VAN VECHTEN moved to set aside the verdict in this cause, and grant a new trial, on an affidavit which stated, that in October, 1802, a motion was made on the part of the defendant for judgment as in case of non-suit; which, no one appearing to oppose, was granted as of course. That the judgment, thus taken, was, in the same term, set aside by the plaintiff, on the usual terms of stipulating to try the next circuit, and paying the costs of not proceeding to trial. That the stipulation was entered into, the costs taxed, and demanded, but not paid, and now continued unsatisfied; that, therefore, and as the defendant's only witness could not be found, he did not attend by himself or attorney at the last circuit in April. That the defendant

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had a good and substantial defence, as informed by his counsel, which he verily believed to be true; that on the merits, the plaintiff could not recover, and that a material witness was wanting, without whose testimony the defendant could not proceed to trial, but which he could procure by the next circuit.

Woodworth, contra, produced a certificate from the clerk of the circuit court, that the trial of the above cause was had on the eight day of April last, when Mr. Van Vechten appeared for Mr. Fisk, attorney for the defendant. On this he contended every irregularity was waived, and the verdict must stand, otherwise the chance of a verdict might be taken at any time after a little advantage obtained, and in case of a want of success, a motion to set it aside resorted to.

Per Curiam. This is an application to set aside a verdict. There are many facts stated. With respect [*155] to the entry of *the rule for setting aside the judgment as in case of nonsuit, there may be some doubt. The clerk finds no rule entered, but as there was a stipulation filed, the court take it for granted that it was on the usual terms. It is necessary, however, that in all cases of stipulation, there should be a demand of costs; this demand should be accompanied with a copy of the rule, and if the costs be not paid in twenty days after, then the party may enter up judgment of nonsuit, and take the effect of his application.[1] The defendant swears that he did present a bill of costs, but does not say it was with a copy of the rule annexed; this, too, was on the agent, and not on the party, or his attorney. The defendant, therefore, has not been correct in his proceedings, and if the demand was not regular, the plaintiff was regular in noticing his cause for last April, and bringing it on to trial.

[1] See *Lowe v. Rose*, 6 Cow. 394; *Shattuck v. Chamberlin*, 4 Id. 14; *Chadderton v. Barkers*, 6 Wen. 521; *Howard v. McKnight*, 25 Wen. 688.

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But, admitting that in so doing he had been guilty of an irregularity, the defendant's appearing on the trial is a waiver of all advantage to which he might otherwise have been entitled. It was decided last term, in the case of *Brain v. Rodelicks* and *Shivers*,^(a) that if a party appear, he waives all irregularity. But it has been shown there was not any; and if there was, the conduct of the defendant has placed the case in the same situation as if there was not. The plaintiff, therefore, is regular. Against this is read an affidavit of merits; on such an affidavit the court will not set aside a regular verdict. There is no irregularity; the defendant appeared,^(b) and has shown no excuse why he did not defend; for if his witness could not have been obtained, the court, on the common affidavit, would have put off the trial. The defendant must take nothing by his motion.

Motion denied.^(b)

LEWIS, Ch. J. absent.

 COGSWELL against VANDERBERGH.

When proceedings have been regular, a mere affidavit of merits is not sufficient ground to set them aside. In such a case, if there has been a mistake on which the judgment has been taken, the defendant will be relieved only on costs and terms.

WOODWORTH, on the part of the defendant, moved to set aside the default, and all subsequent proceedings on

(a) S. P. See *Day v. Wilber*, 2 Caines' Rep. 134.

(b) The rule as to paying of costs seems to be, that when a party asks a favor of the court, which is granted on payment of costs by him, he must seek the opposite side and tender the costs *instantly*. *Pegley v. Van Allen*, 8 Johns. Rep. 352. When the application is for a right, which is allowed, and costs ordered to be paid by the opposite party, they must be demanded with a copy of the rule annexed. When the application is for a right, which is refused, on payment of costs, &c., by the other party, they must be sought as in the case in the text.

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two affidavits, made by the defendant and another person, stating that a *capias ad respondendum* in this suit, was duly issued and served in the month of November last; that in

February following, the defendant called on the [*156] plaintiff, and *offered to pay part of the debt if he could have time for the residue; that this being agreed to, the defendant paid 300 dollars, and the plaintiff promised to stay all proceedings; the defendant's affidavit further showed that he had frequently called on the plaintiff to settle the residue, but that he was either from home, or engaged in company, and had, notwithstanding his agreement to stop the suit, gone on, obtained a judgment by default, and taken out execution; that the defendant, relying on the agreement, had not employed any attorney, and the execution was for more than was due, credit not having been given the defendant for an account which he had against the plaintiff. The affidavit, *Woodworth* said in addition to its being supported by the deposition of another person, carried internal evidence of its truth. It was not natural to suppose that a man should pay, after an arrest, so large a sum, on account of the debt, under no kind of agreement, but leave himself open to an execution for the residue the very next moment. He, therefore, hoped the court would set aside the whole proceedings, as being in violation of every principle of good faith.

Van Antwerp, contra, read a long affidavit by the plaintiff, denying the receipt of the money on any condition, and swearing to the justness of his execution; but the denial rested on his own testimony alone.

Per Curiam. This is an application to set aside the judgment, and all subsequent proceedings. The affidavits are very lengthy, and so far as they relate to merits, we put them totally out of view, for on that point they cannot be received, the plaintiff having been perfectly regular, according to the rules of this court. But the motion is made

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on the further ground of surprise. To this effect the defendant has sworn, and his testimony is corroborated by that of another witness to the same effect. On the other hand may be opposed the positive denial of the plaintiff. If the weight of testimony be to decide, it will be found with the defendant. There has at least been a misunderstanding in this business. The defendant thought he paid his money that the suit might not go on, and therefore, did not make any defence. It is evident some great mistake has *been made; the plaintiff, however, is [*157] perfectly regular, and as each side may have thought himself right, the judgment and proceedings must be set aside on payment of costs, pleading issuable, and taking notice of trial for the next circuit.(a)

Judgment and proceedings set a side on terms.

(a) Whether regular proceedings shall be set aside on merits has, in our practice, been *vexata questio*. It is certain that the rule of "putting merits totally out of view" on such an occasion was acknowledged more than once before the decision in the text, *Edwards* ad. *McKinstry*, Col. Cas. 124, and even in the case of bail desiring to stand in the place of their principal, *Laessing* ad. *Gorham*, ibid. 116. Subsequent decisions seemed to confirm its strength, *Beckman* v. *Franker*, 3 Caines' Rep. 95, by their very exceptions; as when in favor of an administratrix, *Smith* v. *Nitchie*, Caines' Prac. 221, since reported 2 Johns. Cases, 287, when from the mistake of the attorney either as to the time of pleading, *Russell* v. *Ball*, Caines' Prac. 221, or of the terms in which the writ was returnable, *Gardinier* v. *Crocker*, 3 Caines' Rep. 139, merits were allowed to relax, and, if strongly made out, to supersede the rule. *Giles* v. *Caines*, 3 Caines' Rep. 107. What it now is, may perhaps be gathered, by observing that where there are merits, and a trial has not been lost, a regular default will be set aside on payment of costs. *Jackson* v. *Stiles*, 4 Johns. Rep. 486. *Davenport* v. *Ferris*, 6 Johns. Rep. 131. Even where a trial has been lost, and a writ of inquiry executed, if from a mistake on a doubtful point, *Bennett* v. *Fuller*, 4 Johns. Rep. 486, or in favor of administrators or executors, to prevent their being charged *de bonis propriis*; *Phillips* v. *Hawley*, 6 Johns. Rep. 129. *Fenton* v. *Garlick*, ibid. 287, the above rule as to merits will not prevail. In what the merits consist ought, however, to be set forth in the affidavit on which the motion is made, *Wilkes* v. *Hotchkiss*, 5 Johns. Rep. 360, or stated as "being a good and substantial defence on the merits, as advised by counsel." *Cannon* v. *Thus*, ibid. 356. See the observations on these words when used in opposing a reference, *ante* p. 151, n. (b), and the regard to be had to merits as laid down in Caines' Prac. 222.

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HOFFMAN and SETON *against* SMITH.

Want of funds belonging to the drawer excuses notice of non-payment, as well when the bill is accepted, as when not. A professional man, not employed by a party, is a good witness against him. If a defendant read part of an answer of the plaintiff to a bill of discovery, *quare*, whether the whole is made evidence?

THIS was an action by the second endorsee against the maker of a promissory note, dated the 11th June, 1796, payable one year after date.

The facts were briefly these: the note was originally payable to one Thomas Cooper, who endorsed it to Nicholas Hoffman. When it fell due, Smith, the maker, being unable to take it up, gave N. Hoffman a bill of exchange on William W. Burrows, of Philadelphia, for the amount, which, when paid, was to be in satisfaction. In the mean time, it was agreed by all parties, that the note should be left in the hands of N. Hoffman, Cooper consenting to remain liable, if the bill of exchange was not paid. After these transactions, N. Hoffman being largely indebted to the plaintiffs, endorsed the note over to them on account. The bill of exchange was presented, and accepted, but not paid, upon which the plaintiffs commenced the present action. The defendant pleaded the general issue, payment, and gave notice of special matter

At the trial, the hand-writing of the different parties being admitted, the plaintiffs there rested their cause.

The defendant then read in evidence a copy of a bill in chancery, filed by himself against the plaintiffs, for a discovery and injunction, setting forth the preceding facts, and charging a want of notice of the non-payment of the bill of exchange, in consequence of which he became discharged, and N. Hoffman responsible to him for the amount, which he was entitled to set off against the note; for being endorsed after due, it was liable to all the equi-

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ties of the maker against the endorser.(a) The defendant also read in evidence such part of the answer of the plaintiffs to the *above bill, as confessed the [*158] facts above stated, and the want of notice; on which he rested his cause, and moved for a nonsuit, the plaintiffs not having proved notice to him of the non payment of the bill.

The plaintiffs' counsel then proposed reading the residue of the answer, which, on the part of the defendant, was objected to, but overruled. On its being read, it appeared that Burrows had no funds in his hands at the time this bill, with many others, was drawn, but that he had accepted them to support the credit of the defendant, on his engaging to provide for their due payment. That the defendant had confessed this, and acknowledged he knew the bill was dishonored, as he had been unable to furnish the means he had promised. The answer further stated, that Burrows paid his acceptances, lent to the defendant till he was totally ruined, in consequence of which he became and continued wholly insolvent, having, however, large demands against the defendant still unpaid. The plaintiffs proved also, by the evidence of Mr. Troup, who had been professionally employed by Burrows against the defendant, that the debt due from the defendant to Burrows now exceeded 20,000 dollars.

The judge charged, that the acceptance of the bill was *prima facie* evidence of funds in the hands of the acceptor, and made it incumbent on the plaintiffs to show the want of them, which, in his opinion, had been done. That if the jury should concur with him, they ought to find for the plaintiffs, but if they thought the want of funds not sufficiently established, they should find for the defendant.

The jury brought in their verdict for the plaintiffs.

(a) *Banks v. Colwell*, cited 3 D. & R. 81. *Brown v. Davis*, *ibid.* *Beck v. Robley*, 1 H. Black. 89, n. (a). *Sebring & Van Wyck v. Rathbun*, 1 Johns. Cases, 331. *Lansing v. Gaine & Ten Eyck*, 2 Johns. Rep. 300. *Hendricks v. Judah*, 1 Johns. Rep. 319. *Furman v. Haskin*, 2 Caines' Rep. 368.

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It was now submitted to the court, without argument, whether the defendant was not entitled to a new trial on the following grounds:

1. That *after acceptance* of a bill of exchange, notice of non-payment is always necessary, and the want of it discharges the drawer.

2. That the want of funds could not, after acceptance, excuse the not giving notice of non-payment; (a) [*159] and that such want of funds was not sufficiently proved in this case, as the testimony of Mr. Troup, and that part of the answer in chancery which related to the deficiency of funds, were improperly received, and ought to have been excluded. (b)

THOMPSON, J., delivered the opinion of the [*160] court. *The notice to the drawer of non-payment, although in general requisite, was not necessary in this case, because the drawer had no effects in the hands of the drawee, and, therefore, could receive no injury from the want of it. The reason for notice failing, the necessity of giving it is superseded. The acceptance by the drawer made no alteration in the rule. Notice of non-payment was not necessary because of no use to the drawer. *Walwyn v. St. Quintin*, 1 B. & P. 652. The proof of the

(a) See *Pickerdike v. Boleman*, 1 D. & E. 410, 411, what is said on this point by Buller, J.

(b) Where the answer of either plaintiff or defendant is given in evidence against him, though the party adducing it may read only so much as suits his purpose, yet the whole is made testimony, if insisted on by the party against whom it is used. *Lynch v. Clarke*, 3 Salk. 154. *Earl of Bath v. Bathurst*, 5 Mod. 10. Gilb. Ev. 51. But this does not extend to making those matters evidence in his favor which are stated in his answer merely as hearsay; *Roe v. Ferrans*, 2 Bos. & Pull. 542, nor, as it would seem, to those cases where the answer does not go to support the issue, but merely to establish a collateral point. Therefore, where the answer was introduced to prove the incompetence of a witness, by showing he had an annuity out of the land in question, the court refused to order the whole to be read. *Sparis v. Dray*, 2 Bac. Abr. by Gwillim, 622. In order to make an answer evidence the bill must be produced, to evince there is a *lis pendens*. *Id. Ibid.*

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want of funds was conclusive; it arose from the repeated confession of the defendant himself. Nor was there any weight in the objection to the competency of Mr. Troup's testimony, his information being received in the character of a friend, and not in that of counsel. The want of funds in the hands of Mr. Burrows was sufficiently proved, independent of any facts contained in the plaintiffs' answer to the defendant's bill in chancery. *Wilson v. Rastall*, 4 D. & E. 759.

It is, therefore, unnecessary to say, whether the whole answer ought to have been received as evidence or not. (a)

Motion denied.

HAWKINS and others against BRADFORD.

On a reference, if a receipt given after the rule made, be offered in evidence on the part of the defendant, and objected to by the plaintiff, the special matter and facts should not be returned to the court, but the referees should admit it and make the report upon it, that the party aggrieved may bring it fully before the court. *Quare*, if a special return of facts without a decision be, in every case, a report within the meaning of the rule.

VAN VECHTEN moved for a rule against the referees in this suit, to show cause why an attachment should not issue

(a) The rule dispensing with notice where there are no funds, was introduced for the purpose of defeating speculations on the chance of an exoneration in law, from the want of notice, by a set of men who drew bills without having any funds to answer them in the hands of the drawee. That it was ever adopted has been a source of frequent regret, though it has, by successive decisions, been fully established. But any effects in the hands of the drawee, at the time of drawing, entitle to notice, *Orr v. McGinnis*, 7 East, 359, though the drawer be indebted to him more than the amount of the bill. *Blackhan v. Doren*, 2 Camp. 503. See *Rogers v. Stephens*, 2 D. & E. 718. *Wilkes v. Jacks*, Peake, 202. *De Berdt v. Atkinson*, 2 H. Black. 336. *Corney v. De Costa*, 1 Esp. Rep. 302. *Nicholson v. Gouthit*, 2 H. Black. 609. *Staples v. Okines*, 1 Esp. Rep. 332. *Dennis v. Morris*, 3 Esp. Rep. 158. *Legge v. Thorpe*, 2 Camp. 310. S. C. 12 East, 171. *Robinson v. Ames*, 20 J. R. 146. *Agon v. McManus*, 11 Id. 180. *Cruger v. Armstrong* 3 J. C. 5. Anth. N. P. 55, n. [a].

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against them for not making up their report, or that they be ordered so to do. The affidavit on which the application was founded set forth that at the meeting of the [*161] referees, *after the counsel of the plaintiffs had opened their case, and stated the nature of their demand, the counsel for the defendant presented a plea to the referees on receipt of which they refused to hear any testimony on the part of the plaintiffs, and neither reported any thing due to them, nor did they make any report in favor of the defendant.

Spencer, contra, resisted the application, and submitted to the court a special statement of the matter in the nature of a report. The facts as there stated were, that after the due assembling of the referees, &c., they called on the counsel of the plaintiffs to specify his clients' demand, which, excepting the question of interest, was originally admitted by the defendant's counsel to amount to about 1,400 dollars, but that there was a defence, which would supersede the necessity of proving the exact sum claimed, though it might be ascertained by the books and bills before the referees; that the defence was, payment of 1,469 dollars in full satisfaction, for proof of which a receipt was offered in evidence, and an acknowledgment, under the hand of the plaintiffs' attorney, admitting certain things which the subscribing witness would have sworn to, if present. That the plaintiffs objected to the admission of this testimony, but before the question of admissibility could be argued, the defendant produced the following plea: "And now at this day, that is to say, on the 19th day of July, 1803, before George Hale, Samuel Edmonda, and Roswell Hotchkis, referees herein appointed, it being the first day and time of their meeting hereon and upon the matters referred to them in the above cause, comes the said John, by Erastus Root, his counsel, and says that the said Joseph, &c., ought not further to maintain their said action against him the said John, because he says, that

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after the 14th day of May last past, from which day, day was given to the said referees to make their report until the first Monday in August next, before the justices of the supreme court, &c., at the city-hall of the city of Albany aforesaid, the aforesaid action was continued, to wit, on the 28th day of May, in the year aforesaid, at the city of Albany, in the county of Albany aforesaid, the said John did pay to the said Joseph, &c., the sum of one *thousand four hundred and sixty-nine dollars in [*162] full satisfaction, and discharge of all and singular the matters and things, and the sums of money due to the said plaintiffs, and for the recovery whereof this aforesaid action hath been brought and prosecuted, and which said sum of one thousand four hundred and sixty-nine dollars was then and there accepted, taken and received by the above plaintiffs, in full satisfaction and discharge of all and singular the matters and things, and of the sums of money due to them, and for the recovery whereof this aforesaid action hath been brought and prosecuted, and this, &c., wherefore," &c. That thereon the referees adjourned the further hearing, and returned the said plea.

This was a report; it was all the referees could do, as they could not undertake to decide whether the plea was good or not, that being matter of law.

Per Curiam. The motion is that the referees be ordered to make a report, they having, instead of that, made a special return of all the facts, to which they have annexed the plea of the defendant, offered to them at the hearing. The application must be granted; therefore, let the rule be that the referees report by the first day of next term.(a)

KENT, J., observed, that the bench were of opinion the referees should, in making up their report, allow the receipt, if they believed it genuine, and to have been fairly obtained,

(a) Attachment in the proper course to compel a report, where referees refuse to make one. *Thompson and others v. Parker*, 3 Johns. Rep. 260.

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in order that the plaintiff, on whose affidavit the application was made, might, if he thought himself aggrieved, or that it was improper to allow a receipt given after the rule to refer, apply to the court to set aside the report on that ground, at which time the question might be fully argued.[1]

THE COURT desired that all cases submitted to them without argument should be so endorsed, because they might otherwise be laid aside under an idea that an argument would take place.

JACKSON, on the demise of LE ROY and others, against
STERNBERGH.

Though there has been evidence on both sides, a new trial will be granted, if it appear that justice has not been done.

THIS was an action of ejectment, brought for the recovery of lands situated in Schoharie, in a patent [*168] granted to Myndert Schuyler and others, tried at the Schoharie circuit, on the 30th of May, 1802, before Mr. Justice *Thompson*.

On the trial it was admitted by both parties, that the title to the premises in question was once vested in Rip Van Dam; and that it was included within the equal one seventh part of the said patent, which fell to the share of Van Dam, who was one of the patentees.

Also that the title of Van Dam to the whole of the equal and undivided one seventh part of the said patent, which included the premises in question, was legally conveyed by him to Johannes Schaeffer, Henrick Schaeffer, Tennis Swart, and Henrick Van Valkenbergh.

[1] See Code of Procedure, sec. 272.

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The plaintiffs gave in evidence a deed from them to Jonas Le Roy, dated January, 1730-31, releasing "all the one full and equal seventh part of all the undivided lands *between Scoharie river and the hills*, from Fox's creek to a place where two rivulets or runs of water come in one, and fall or run in Scoharie river, by north of Garlickt Town." After this, was adduced the will of Jonas Le Roy, made in January, 1749-50, by which he devised the one half of the lands owned by him in Scoharie, to Levinus Le Roy, and the other half to David Le Roy, after the death of Maria, his wife. It was then proved that David died, leaving an only son, named William, one of the lessors of the plaintiff, in behalf of whom, Adam B. Vroman further testified that, about fourteen years since, the defendant himself showed the corners of the lot called No. 156, and its boundaries, which included the premises in question, and said it was Le Roy's lot. That one of the lessors, Levinus Le Roy, about the same time, requested the witness to take charge of this lot, and see that there was no waste of timber. That it had always been called Le Roy's lot. That it had never been cleared or fenced till about four or five years since.

Peter Becker deposed, that Le Roy's lot lay north of Fox's creek and south of Crab's hill, between the hills and Scoharie creek, but he did not know whether lot No. 156, *lay on the hills or not. It was proved [*164] by three witnesses that the defendant had sworn, before a magistrate, on a certain occasion, that he had been in possession of the premises eight or nine years, that he held the west end of the lot under one Henry Lawyer, and the east end he claimed in his own right, amounting to about fifteen or nineteen acres, and also that the defendant said it had once been Le Roy's lot.

Thomas Machin, a surveyor, swore, that in June, 1801, he surveyed lot 156, at the request of one of the lessors, and that, according to his survey, the premises were included in that lot.

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On the part of the defendant it was contended, that the premises in question lay *on the hills*, and were not included in the boundaries above mentioned, to prove which several witnesses were examined.

Nicholas Sternbergh swore he was seventy-nine years old, and was brought up near the premises; that forty or fifty years ago Jonas Le Roy, under whom the lessors of the plaintiff derived their title, showed him the bounds of the land above described; that he, the witness, was well acquainted with the premises in dispute, and knew they do not lay within those bounds, and Jonas Le Roy had told the witness, that his (Le Roy's) deed did not cover the premises; that he was easterly to the hills only.

Peter Mann, a surveyor, deposed that he run out lot 156. and the premises were not included in it.

Nicholas Sternbergh and David Sternbergh deposed, that they were acquainted with the premises in question; and that they are situated upon what are commonly called the hills, and are not included in the bounds of Jonas Le Roy's deed. One witness swore that the defendant had from time to time, for forty or fifty years past, cut wood for fire and fences on the premises; and another witness testified that the defendant had cleared and cultivated the premises for about twenty years last past.

On this evidence the jury found for the plaintiff.

Tiffany moved to set aside the verdict as contrary to law, evidence, and the sense of the court, and to grant a new trial.

Gibbard, contra.

[*165, 166] *THOMPSON, J. delivered the opinion of the court. The plaintiff deduced a title to a certain piece or tract of land, lying in Schuyler's patent, and which was known and distinguished by lot No. 156, and bounded as follows: "*All the one full and equal seventh part*

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of all the undivided lands between Schoharie river and the hills, from Fox's creek to a place where two rivulets or runs of water come in one, and fall or run in Schoharie river, by north of Garlick's Town." The only inquiry on the trial was, whether the premises in question were comprised within the boundaries above mentioned.

The jury found a verdict for the plaintiff, and application is now made for a new trial.

The description of the premises to which the plaintiff deduced a title, is vague and uncertain; they are described as lying "between Schoharie river and the hills, from Fox's creek to a place where two rivulets or runs of water come in one, and fall or run in Schoharie river, by north of Garlick's Town." This uncertainty may account, in some measure, for the different results in the surveys made by the opposite parties, and for the contradiction which appears in the testimony. The plaintiff's eastern boundary appears to be the hills; and the inquiry was, where is the dividing line between the flats and the hills? The testimony on the part of the plaintiff, except that of Adam B. Vroman, is principally as to general reputation, that this was called Le Roy's lot. Mr. Vroman, however, swears, that the defendant showed him the corners of lot 158, and the boundaries, and he, the witness, said, they included the premises in question. On the part of the defendant, Nicholas Sternbergh swore, that the plaintiffs' ancestor, under whom they claimed as much as forty or fifty years since, *pointed out to [*167] him his boundaries, and that they did not include the premises; that he was born and brought up in that neighborhood, and had always been well acquainted with the premises; that Jonas Leroy, the ancestor of the plaintiff, expressly declared to him, when he was pointing out his boundaries, that his deed did not cover that land, which is now in dispute. It appeared also from the testimony of two other witnesses that the lands in dispute lay on what always has been called the hills, and that the defendant has occasionally cut timber on the premises, for forty or

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fifty years past. The testimony is certainly very contradictory, but none of the witnesses appear to have been impeached. Their testimony, however, may make a very different impression when put on paper, from what it would to hear them examined. Judging only from the case, the weight of evidence is with the defendant. And although this of itself is not a sufficient ground for granting a new trial in all cases, yet from the whole that appears, there is well founded reason to believe justice has not been done; and that another examination of the cause ought to be made before the possession is changed; we are therefore, of opinion, that a new trial ought to be granted on payment of costs.

New trial granted.(a)

RENAUDET against CROCKER.

If a trespass be committed in a town, which before action brought is subdivided, the trespass may be laid as in the original township. A surveyor acting under an appointment by an attorney, may testify without producing the power. An agent who has promised to refund money, received on account of his principal in case a verdict pass against him in any particular suit, is a good witness in that very cause.

THIS was an action of trespass *quare clausum fregit*, tried at the May circuit for the county of Saratoga, in the year 1803, before Mr. Justice Kent. The only questions raised for the determination of the court were,

1. Whether, if a trespass be committed in a part of a town, which, by a division made before the commencement of the action, is annexed to another township, the plaintiff can declare as for a trespass committed in the township where the *locus in quo* was originally situated?
2. Whether a surveyor, acting under the authority of a

(a) See *ante*, p. 25, n. (a).

Renaudet v. Crockett.

person appointed by virtue of a power of substitution in a letter of attorney, ought to be admitted to testify to the facts of such survey, without showing the letter of attorney, though it was acknowledged to exist?

*3. Whether an agent, having received several [*168] sums of money on account of trespasses alleged to have been committed on the lands of his principal, and which he promised to refund if he did not recover in the present action, was a competent witness.

The fourth was merely as to the weight of testimony.

LIVINGSTON, J. delivered the opinion of the court. 1. The trespass having been committed in 1797, at a place then within the town of Saratoga, the plaintiff had a right to allege it was done in that town, according to the truth of the case, without regard to its subsequent division. The judge, therefore, properly overruled this objection.

2. It was not necessary to produce the plaintiff's letter of attorney to Beriah Palmer. The object of Baldwin's testimony was to show that Jacobs lived on a lot of the plaintiff's, and acknowledged his right; that it was then regarded as the plaintiff's, taken care of as his, and possessed under him; whether this had been done under a power or not, was immaterial. The ownership and possession of, or under him were the important facts to be established.

3. Beriah Palmer was a competent witness, (a) notwithstanding the agreement he may have made to refund the moneys he had received from other trespassers, in case the plaintiff failed in this suit. Such moneys must have been received for the plaintiff; and he only, and not the witness, would be affected by such refunding.

4. If the jury believed the plaintiff's witnesses, and we

(a) The witness was equally liable to both parties; to the plaintiff, in case of a recovery, for money received to his use; on the other hand, to the trespassers in the same form of action, if the verdict was against him. See *Milward v. Hallett*, 2 Oshes' Rep. 84, n.

See New York Code of Procedure, secs. 398, 399.

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are to presume they did, the verdict is not against evidence, and ought not to be disturbed.

Judgment for the plaintiff.

PETTINGAL, *qui tam*, against BROWN,

In a *qui tam* action under the statute of usury brought after lapse of a year, to recover the excess of interest paid, the borrower is, after having discharged the principal, a good witness.

THIS was an action of debt, under the statute for preventing usury, brought in the common pleas for the county of Oneida, to recover the excess of interest paid over and above the legal rate allowed.

The facts were, that one Joseph Loomis borrowed a sum of money from the defendant, and by way of security assigned to him a lease as a pledge, accompanied by a promissory note (intended to operate as a bill of sale) [*169] *for a horse and a cow. On repayment, the assignment and note were, by an agreement executed by both parties, to be void. They were, therefore, on the loan being returned, given up, and the agreement cancelled by tearing off the names and seals affixed.

The year limited by the act (1 Rev. Laws of N. Y. 57, 82,) for the party paying to bring his action having elapsed, the suit was by a third person.

To prove the usurious contract, and payment, Loomis, the borrower was called on the part of the plaintiff: he was objected to by the defendant's counsel as incompetent, and his testimony being deemed inadmissible, the defendant obtained a verdict.

For thus excluding the evidence of Loomis, the plaintiff tendered a bill of exceptions, on which the proceedings were brought up, and the question now was on the competency of Loomis the borrower.

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Gold, for the plaintiff. The only question for the court to determine is, whether, after a man has fairly discharged, to its utmost extent, a usurious contract, by payment both of principal and interest, he shall not, in an action given by the statute to a third person, be competent to prove the usury. It is to be observed he can have no species of interest; the money is paid; the debt, therefore, cannot be avoided, nor is he interested in the event of the suit, for as it is brought by another person, it can be only to the advantage of him, and those for whom he proceeds, that it can enure. This point is settled in the case of *Abrams v. Bunn*, 4 Burr. 2251, so far as it is an authority in this court. The objection that a witness shall not be permitted to testify any thing which may invalidate an instrument to which he has subscribed his name has, by later decisions, been restrained to negotiable paper alone. *Baker v. Bent*, 3 D. & E. 27, overruling in that respect the judgment of *Walton v. Shelly*, 1 D. & E. 296. Therefore, the present case is clearly out of any of those reasonings on policy, &c. because the instruments were not negotiable, and were satisfied. Indeed how far they ought under any circumstances to prevail may be a question since the determination in **Jordaine v. Lashbroke and another*, 7 D. & E. 601.(a) If the question be open in this court, it may be, with great justice, contended, that the case of *Walton v. Shelly* is an encroachment upon the landmarks of evidence, but howsoever that may be, the present is a very different question, for it does not go to the invalidating any instrument, the money on those given having been paid, and the whole coming within the authority of *Abrams v. Bunn*.

Brees, contra, Public policy requires that no person who

(a) The decision there was, that the payee of a bill of exchange may, in an action by an endorsee against the acceptor, prove the bill "void in its creation." *Quære*, whether this distinction be not perfectly sound; for the contract remains? *Robinson v. Bland*, 3 Burr. 1077.

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Has signed an instrument shall be, in any cause, admitted as a witness to invalidate it; because no man shall be allowed to testify against his own act. By this very court, in an action by the assignees of a certificated bankrupt to recover back the amount of a note given on a usurious consideration, the bankrupt was, in July term, 1802, held an incompetent witness to prove the usury. He was there clearly disinterested; his property was assigned to his assignees, and had they recovered, the amount of the verdict would have gone to his creditors. The case in *Burrows* applies to transactions where a written security is not given: there the borrower may be a witness; and to the same effect is 2 Hawk. 386; 3 Woodd. 308. But where the contract is by writing, no one whose name is upon it can be received. *Walton v. Shelly*, 1 D. & E. 296. 2 Hawk. 387. 3 Woodd. 308. The point, therefore, upon the authority of Lord Mansfield, may be considered to be at rest. The distinctions since taken are subsequent to the revolution, and, therefore, not binding here. In them it is also to be observed that the judges are far from being consistent. Buller, 3 D. & E. 36, restrains their admissibility to cases of negotiable paper; Lord Kenyon, 7 D. & E. is for receiving in all cases the testimony of witnesses who have no direct interest; Ashurst, J. however, totally dissenting. It is true the reasoning from policy may have been stronger in the case of negotiable paper, but as the law now stands, and the assignment of *choses in action* constantly practiced, the principle has of late been much narrowed. If a [*171] written contract (not negotiable) be assigned, the assignee "may sue in the name of the original claimant, and such original claimant, shall not be permitted (at law) to undo his own transfer, or to obstruct the suit of the plaintiff." 2 Woodd. 388.

Gold, in reply, was stopped by the court.

Per Curiam. We are unanimous that the judgment of

 Jackson v. Chamberlin.

the court below be reversed. This case does not come within any of those cited in favor of the defendant. The paper here is not only satisfied but destroyed. The action is not to annul the security, or take away a fair consideration from the defendant. There is no question of interest. *For that*, to render a witness incompetent, it has before been settled, that the interest must be in *the event of the suit*. By this determination neither public policy, nor the interest of the witness, can be affected; he, therefore, was fully competent.

Judgment reversed.

JACKSON, on the demise of WILLIAMS and others *against*
CHAMBERLIN and others.

When a plaintiff resists a motion as in case of nonsuit for not going to trial, if he insists on his having been unable to try his cause, and others have been heard, he must show that they were older issues.

RUSSEL moved for judgment as in case of nonsuit, for not proceeding to trial. The affidavit stated, that issue was joined previous to June, 1802.

Van Vetchen read an affidavit, setting forth that thirty-five cases were on the calendar, of which only thirteen were tried, but from the length of those, and the criminal business before the court, the present action could not be heard.

Per Curiam. As many causes were tried, it is incumbent on the plaintiff to show that those issues were older than his. Let the defendant take the effects of his motion, unless the plaintiff stipulate and pay costs.^(a)

Motion granted, *nisi*.

LEWIS, Ch. J. absent.

(a) See *M'Vicker v. Alden*, ante, 58; *Weed v. Ellis*, ante, 115; *Jackson v. Van Vetchen*, 3 Ormes' Rep. 128; *Hawth v. Tynlor*, 10 Wen. 592.

Deas v. Smith.

DEAS *against* SMITH, President of the Columbian Insurance Company.

If a witness has been in the power of a plaintiff, he must show endeavors to obtain his testimony, or he will not be allowed to urge the want of it for not going to trial.

Counter affidavits to those in opposition to a motion, not admissible.

If a suit be culled and passed, the reasons why should be made appear by the counsel in the cause.

If offers of compromise have been made to the plaintiff, and refused, on a motion for nonsuit, the court will not order them to be imposed, *as semb.*

ISSUE had been joined in this cause, in 1800, and two commissions had been sued out; one had been returned, but a long time having elapsed, the defendant gave notice, for the last term, that he would then move for judgment as in case of nonsuit. On the motion being brought [*172] on, the plaintiff *stipulated to try, at the next sittings, or circuit court, reserving to himself the right of applying to the court for a renewal of the stipulation, in case the other commission, then pending, should not be returned.

Benson now renewed the application for judgment, on an affidavit, stating, that a few days after the above stipulation was entered into, the commission to which it alludes arrived, and that the cause had been duly noticed for the last sittings, but had not been brought on

Woods, contra, read an affidavit by the parties, on account of whom the plaintiff had effected the policy of insurance, on which the present action was brought, stating the loss, exhibition of proofs, application for payment, refusal to pay, commencement of suits, suing out of commissions, and their return. That the interest was not fully proved by the witnesses examined under the last commission, as

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they were privy only to the lading of what was purchased by one of the witnesses, and covered by a former policy, but knew nothing of the residue; that the cause was, nevertheless, noticed for trial, under an idea of proving interest in sundry other articles of the cargo by one York Wilson, who, though a seafaring man, the deponent believed to be permanently resident in New York, as he had lived there for twelve months uninterruptedly, but had lately gone to the East Indies; the deponent first learnt this circumstance during the time of the last sittings, and his witness was not expected to return before the ensuing winter; that being advised the testimony of Wilson was material, the defendant did not proceed to trial. But that he was advised, and believed, one William Robinson, shortly expected here, was a material witness for him, and that he believed he should be able to obtain Robinson's attendance at the next sittings in New York, or the circuit thereafter; that, as the deponent was informed, and believed, the ground of defence insisted on by the defendant, was the want of interest in the assured, and that the deponent understood, and believed, the defendant, or some person in his behalf, offered to return the premium, and pay costs which offer the deponent refused to accept. That the deponent was informed, and believed, the cause was one of the *oldest on the calendar, but was, when called in [*173] its order, passed, for the accommodation of the defendant; that the deponent would have proceeded to trial, but for a notice to produce certain papers, which he was not prepared to do. These reasons, *Woods* argued, were sufficient to prevent the object of the motion; at least, if a nonsuit was ordered, it would be on condition of the defendant's abiding by his own proposal, and paying what was acknowledged to be due, the premium and costs of suit.

Benson offered a counter affidavit to show that York Wilson was a slave, and therefore the want of his testimo

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ny could never have prevented the cause from being heard, because, had he been present, his evidence could not have been received.

Woods contended, that counter affidavits were inadmissible, because, in the first place, a copy had never been furnished, and, in the next place, the practice was to exclude them, it being incumbent on the party moving, to support his application on his original depositions.

Benson acknowledged the general proposition, but distinguished the present case by this circumstance; that the counter affidavit was not to support the motion, but to contradict a collateral and independent fact, asserted by the plaintiff; and, as to not being furnished with a copy, the plaintiff had not given a copy of his.

Woods. Copies of affidavits in exculpation are never afforded; those to charge or demand are.

Per Curiam. The application is for judgment as in case of nonsuit; this is opposed by a deposition read by the plaintiff, disclosing facts, to rebut which, the defendant offers a counter affidavit: (a) a question is made whether it can be received. On examining into the point, the court

(a) Counter affidavits are those in opposition to an affidavit read; supplementary affidavits are those in addition: the former are always received by way of defence to an application, except as against merits sworn to, on moving to set aside an inquest; (*Phillips v. Blagge*, 3 Johns Rep. 141,) but even then to rebut an excuse for not noticing for the first day of term, they are admissible. *Quin v. Riley*, *Ibid.* 362. So counter affidavits are allowed in support of the character of a person, on whose deposition the motion is made, if his character for veracity be attacked by the affidavits adduced in opposing the application; but not if the counter affidavits support his character collaterally, by only a further swearing to the same facts. *Clark v. Post*, 3 Caines' Rep. 125. And observe, that affidavits in addition to those used by the plaintiff on showing cause of action before a judge, may be read as counter affidavits, on an application by the defendant to the court for an *amonestetur* on the bill piece. *Hart v. Finckhner*, 5 Johns. Rep. 362.

(See also *Wilcox v. Howland*, 6 Cow. 576.

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finds the practice to be settled against its reception. (*Ante*, 13.) It is expressly decided, in *Grove* ads. *Campbell*, Col. Cas. 114, "that a party can never support his motion by any affidavits but those on which he originally grounds it."

"The motion must, therefore, depend on the first affidavits. From *that* by the plaintiff, among other things which it contains, it appears, that the commission mentioned in his stipulation, as the one then pending, was returned before *the* last circuit, and that he might [*174] have then gone to trial. His affidavit further states, that the return was examined, and the proof wanted not contained in the answers to the interrogatories; that the interest required did not appear; that there was a witness who resided in New York, by whom it was expected to establish the same facts. This witness was not applied to, nor was any measure taken to procure his testimony till after the commencement of the court, and then he is found to be gone to the East Indies. There is, however, another witness, who knows something material, but it is not stated what, nor that any measure is taken to procure his attendance. It is further stated, that this is one of the oldest issues; that it was called on and passed, for the accommodation of the defendant, though it is before sworn he did not proceed to trial, because the testimony of York Wilson was, as the plaintiff was advised by his counsel, material, and could not be had. The court are of opinion the reasons are not sufficient. This is a second application for judgment: there has already been a stipulation, and *that* a special one. The want of a witness is alleged, and no diligence shown to procure him. There ought to have been immediate measures taken to subpoena him.(a) It does not sufficiently appear that the cause was passed for

(a) The rule is, that a new trial shall not be granted for want of testimony which a party had it in his power to adduce. *Palmer v. Mulligan*, 3 *Caines' Rep.* 307. Yet in ejectment, and in favor of an old possession, a new trial was granted to let in testimony in the knowledge of a witness who was ex-

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the accommodation sworn to: it was necessary to have substantiated this; it rests on the single oath of the party; the counsel, himself, ought to have stated this. But, though we should grant the nonsuit, we are requested to do this on condition. The affidavit, as to making the offer, is equivocal; and if, in any case, we would impose such terms, this is not one, for the plaintiff has not disclosed enough to show the proposition was ever made.

Benson pressed the court to reconsider the case in *Coleman*, and weigh his distinction.

Per Curiam. We shall look into it, and if we see occasion to alter our opinion, the bar will be informed of it. In the meantime, judgment of nonsuit must be entered.

Motion granted.

LEWIS, Ch. J., absent.

N. B.—The court never spoke to it again.

 [*175]

*RIPLEY against WARDELL.

An action will lie on an agreement by a third person to procure, after the discharge of a debtor under the insolvent act, his note for a composition on the original debt due the plaintiff, in consideration of his giving up the defendant's note, that it might not obstruct the insolvent's discharge under the act. If a security be deposited on returning of which the depositor will be entitled to something in lieu, on tendering the deposit, an account may instantly be brought for the substitute, and an offer of it, the day after suit brought, is not a defence.

THIS was an action of *assumpsit*, grounded on the following circumstances.

amined on the first trial, but with which circumstance, the person who had the management of the suit was not acquainted till after the cause had been tried. *Jackson, ex dem. Gardner and others, v. Laird*, 8 Johr.a. Rep. 489. See *De Peyster v. Columbian Insurance Company*, 2 Caines' Rep. 85; *Steinbach v. Sims*, 1b. 129; *Malin v. Malin*, 15 J. R. 293; *McKay v. Marine Ins. Co.*, 9 Cal. R. 384; *Hooker v. Rogers*, 6 Cow. 577.

Ripley v. Wardell.

The plaintiff was, in 1796, a creditor of the defendant's brother, John Wardell, as holder of a promissory note of his, for 727 dollars, payable at ninety days after date.

In November, 1799, John Wardell, having a promissory note for 811 dollars and 28 cents, made by one Jonathan Haynes, and dated 16th May, 1798, payable six months after date, and wishing to extinguish the demand of the plaintiff, that it might be no obstacle to his discharge under the insolvent act, offered to transfer Haynes's note to the plaintiff, and at the same time accompany it with a security to give when discharged, his own note for six shillings and eight pence in the pound of the original debt; on doing this he was to receive back the note of Haynes.

Accordingly the defendant, as his surety, entered into the following contract with the plaintiff.

'I do hereby agree and promise to deliver to John Ripley, John Wardell's note for six shillings and eight pence in the pound, for a note now given up for seven hundred and twenty-seven dollars, dated 28th December, 1796, payable in ninety days after date. The note which is to be given by the said John Wardell, is to be dated and given after he is discharged by the act of insolvency, payable eighteen months after date; at which time said Ripley is to return a note of hand against Jonathan Haynes, for eight hundred and eleven dollars and twenty-eight cents, dated 16th May, 1798, payable in six months, which is the property of John Wardell, or return this writing to Robert Wardell, and keep the note against Haynes.

"New York, November 7, 1799.

"Signed ROBERT WARDELL."

Haynes then was, and now is, insolvent: but his note, and the above agreement being delivered to the plaintiff, he gave up the note of John Wardell, who was shortly after discharged under the insolvent law. Previous to the 19th of November, 1801, and after the discharge under the insolvent act, John Wardell obtained his certificate under the bankrupt law of the United States.

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[*176] *On the 19th of November, 1801, the plaintiff commenced the present action, but, before doing so, offered to return, and tendered to the defendant Haynes's note, demanding at the same time John Wardell's, payable at eighteen months, for six and eight pence in the pound, according to the terms of the agreement. In the course of the next day, the defendant tendered the plaintiff John Wardell's note for the composition agreed upon, and payable at the time stipulated. The plaintiff, however, continued to proceed; the defendant gave him a *relicta* and *cognovit actionem* for 270 dollars, the amount of the six and eight pence in the pound on the original debt, subject to the opinion of the court, whether, on the above statement, the plaintiff was entitled to recover. If they should so determine, judgment to be entered for him; if otherwise, a nonsuit.

LIVINGSTON, J., delivered the opinion of the court. It was the defendant's duty, under the agreement stated in this case, to make a tender to the plaintiff of John Wardell's note immediately, or early after his discharge: the giving of such note was a condition precedent to the plaintiff's returning the note of Haynes. The tender of this note after the suit was commenced, (which was not until two years after the defendant's discharge, and after the second bankruptcy of John Wardell,) was too late. If it had been given sooner, the plaintiff might have turned it to some use in the way of business without rendering himself responsible. It does not appear when the plaintiff offered to return the note of Haynes. If at the time of such proposal the defendant had given him John Wardell's note undated as he requested, it might have answered, and the plaintiff would have been bound by an offer, which, in my opinion, was not at all necessary to entitle him to this suit; at any rate, as this request was not acceded to until a day after the suit was commenced, it was too late, and the

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plaintiff must have judgment. for the sum of 270 dollars.(a)

Judgment for the plaintiff.(b)

*THE PEOPLE *against* DENSLOW. [*177]

If an act give a turnpike company power to erect a toll-gate near a particular spot, they may place it on the very intersecting spot of an old road, so as the gate be but near the place designated; for near is not to be construed nearest.

THE defendant has been tried, and found guilty, at the last court of *oyer and terminer* for Columbia county, on an indictment for obstructing, in the city of Hudson, a public road or highway, leading from Poughkeepsie to Kinderhook.

On the trial, it was proved that the defendant was, under the appointment of the president and directors of the Columbia turnpike, keeper of a toll-gate, standing in the city of Hudson, directly across the road mentioned in the indictment, and which had been a public road for more than 40 years.

On the part of the defendant, the exemplification of two acts(c) of the legislature, incorporating a company, by the name and style of the president, directors, and company of the Columbia turnpike road, were given in evidence, and also a permission of the governor authorizing the erection of the gate, in pursuance of the seventh section of the law of the 29th March, 1799, incorporating the company.

(a) See *Cockshot v. Bennet*, 2 D. & E. 763; *Holland v. Palmer*, 1 Bos. & Pull. 96; *Smith v. Bromley*, Doug. 610.

(b) *Quare*, if this case be not shaken. See *Payne v. Eden*, 3 Caines' Rep. 218, n.

(c) 29th March, 1799, c. 59, s. 7; 2 Rev. Laws, 398; 28th March, 1800 c. 69, s. 3; 2 Rev. Laws, 402.

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That of the 28th March, 1800, s. 3. directs, "that the most westerly turnpike, or gate, shall be erected near the dwelling-house of John Van Hoesen, in the city of Hudson."

The testimony adduced, proved that it was placed 8 chains and 15 links from the house.

From a map, submitted to the court, and agreed to by the parties it appeared that the gate in question was placed just at the very spot where the old road, for the obstructing of which the indictment was brought, intersected the turnpike; so that it was impossible to pursue the old road without crossing the turnpike, and going through the gate in dispute, at which half toll was demanded.

The matter for the consideration of the court was, whether under the words of the third section of the act of the 28th of March, 1800, the erection of the gate on that precise spot could be justified: if it could, then a *nol. pros.* to be entered.

Spencer, (Attorney-General,) for the defendant, observed that he had, antecedently to his appointment, been originally retained for the defendant, and expressed his doubts whether he might not, by his official situation, be precluded from appearing in his behalf, but on being told by the court to go on, proceeded thus:

[*178] *The only question is, whether the erection of the gate, at the distance from Van Hoesen's house, mentioned in the case, is an erection within the words of the act. There are two acts of the legislature to be referred to on this occasion. The first is the act of incorporation, passed the 28th March, 1799, establishing a turnpike corporation, by the name of the president, directors, and company of the Columbia turnpike road; the second enacted on the 28th of March, 1800, to amend the first act and route by certain particular alterations. The situation of the most westerly gate, the one now in dispute, is in specific words laid down. Whether they are complied with must be, after the facts are found, a question of law; for unless it be so, no settled determination can be made. The act says the

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gate shall be near the house of Van Hoesen; it is not ordered to be on the part of the road nearest to Van Hoesen's: are not, then, 8 chains and 15 links near? Had the gate been placed more easterly, every person travelling the turnpike road might quit it at Claverack, pursue the old road round the gate, and a little beyond it enter the turnpike again, without paying toll. It is true that by the 10th section of the first act, there is a penalty given for using the turnpike, and then going round the gates to avoid the toll; but this cannot apply to persons using an old road; nor could it be carried into effect, from the impossibility of being constantly on the watch. It is to guard against these inconveniences that the legislature has made use of this relative term "*near*," in order to give a discretion to the company to place the gate where they may think it most beneficial to the interests of the stockholders. Have the president and directors outraged this discretion so confided to them? That the gate catches people crossing the road, is no argument; and even in this, the directors *have shown their moderation, for they demand [*179] only half toll. From the map, it is manifest, if the gate be removed, that in numberless instances, from Kinderhook to Claverack, the tolls may be evaded. The effect would be to create a depreciation of 50 per cent. on the value of the stock. To prevent this, the legislature has given a discretionary power to erect the gate near Van Hoesen's, and can it be said that the company has violated the discretion confided in them for the management of the company's affairs?

Foot and Woodworth, contra. The question is, whether the president and directors have a right to make people, who only cross the road, pay as if they had travelled along it? There is nothing more; nor less presented by the case. The gate is fixed at the very place where the old road crosses the turnpike. It never could have been the intention of the legislature, by allowing a new road, to tax the

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old : yet such is the consequence of the construction of the act now insisted on by the defendant. For it is evident, by looking on the map, that when the turnpike is crossed, and the old road pursued, the turnpike can never again be entered on, for the old road comes in at the head of the city of Hudson. Had the legislature been told that the effect of the act they were about to pass, would be to levy a toll on the old road, they would certainly have hesitated. Allowing the word *near* to be, what it certainly is a relative expression, it must be taken to mean *near, so as you do not attack the rights of the community*, and set up your gate to catch people who travel along their own old road, and only cross yours.

This is the only construction which can be equitable for the company and the community. The intent of the act was to give a right of toll from those who travelled along the road the company had made ; and therefore, against such, there is a penalty of ten dollars given for evading the rate allowed to be taken. This is enough to secure the company from tricks that might otherwise be practised. The word *near* must be understood by examining the intent of the act. The old road was considered when [*180] the act was passed, and it never was the object of the legislature by the word *near*, to shut it up. This is a trick of the company to entrap the traveller, and this, the jury, by their verdict, have found, on a very full examination. The court will certainly, after this, be cautious of saying "*near*" is this very spot. It is granted that the words of the act will be satisfied by it, but is there no other place which will do so ? and may not one be found, equally near, unattended with any of the inconveniences now objected against the gate ?

LIVINGSTON, J. delivered the opinion of the court. The defendant has been indicted, and convicted, for obstructing a public highway in the city of Hudson.

He was keeper of a gate under the Columbia turnpike

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road company, and the gate he attends is erected 8 chains and 15 links from the house of John Van Hoesen. This gate has been set up under that part of one of the laws incorporating this company, which declares (Laws N. Y. v. 2, p. 402,) "that the most westerly gate on said road shall be erected ~~near~~ the dwelling-house of John Van Hoesen;" and it is submitted to us to say, whether it has been placed conformably to these directions; if that should be our opinion, a *nol. pros.* is to be entered on the indictment.

It is not denied by the public prosecutor, that this gate is near Van Hoesen's house; but because it is not as near as it might be, and intercepts those who travel a certain road leading from Poughkeepsie to Kinderhook, and which crosses the turnpike at this place, he insists the gate should be removed, so as to occasion no interruption of this kind.

Whether this circumstance exists, or not, is foreign from our inquiry. The legislature, under a full knowledge of the different roads in that part of the country, have authorized the erection of a gate near this house, and have thereby invested a discretion in the company, which, it must have been expected and intended, would be exercised for their benefit. So long, therefore, as this gate be near to Van Hoesen's house, which is conceded to be the case, *we have no right to interfere, by saying that this [*181] discretion has been abused, or that the company have obstructed the highway leading from the south to the north: this would be the same as to say, that they shall not do what the legislature have given them permission to do. Our opinion, therefore, is, that this gate was erected pursuant to law, and the present prosecution cannot be supported.[1]

[1] See *Furme's Turnpike v. Coventry*, 10 J. R. 389.

The People v. Dole.

THE PEOPLE *against* DOLE.

The court will not grant a rule against a sheriff to show cause why an information should not be filed against him, for false swearing in an affidavit annexed to a plea of recaption on fresh pursuit, if the plaintiff, at whose suit the prisoner was in custody, be then proceeding against the sheriff for the escape.

THE *Attorney-General* moved for a rule on James Dole, late sheriff of Rensselaer, to show cause why an information should not be filed against him for false swearing. The motion was founded on two affidavits, and certain records on file in this court, from which it appeared that Dole, while sheriff of Rensselaer, had in his custody one Isaac Bull, charged in execution at the suit of one Edward Rawson. That Bull having escaped from custody, a suit was thereupon instituted by Rawson against the sheriff, who pleaded a retaking on fresh pursuit, and pursuant to the act in such case, (March 20th, 1801, s. 22,) &c., accompanied his plea with an affidavit, (see *ante*, 2, n.,) that the escape was without his consent, knowledge or privity; which suit is still pending.

The affidavits on which the application was made, were by Bull and another, who was in prison with him during his confinement. They stated that Dole repeatedly declared to Bull that he had broken *his bonds*, (bonds entitling to liberties,) was no longer his prisoner, and could go where he pleased. That Bull at length quitted the prison, and went to his own house, where he remained, until replaced in gaol, under process in another suit.

Per Curiam. The object of the application is to render Dole liable for the penalty of 1,250 dollars imposed by the statute on every sheriff, whose affidavit accompanying such plea, shall at any time afterwards appear to be false.

There are two objections to granting this motion. The

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one, that neither of the affidavits state that Bull had not, as charged by the sheriff, previously forfeited his bonds by an escape, involuntary on the part of that officer. If such was the fact, the sheriff's affidavit is not [*182] falsified, though we admit every thing stated in the affidavits, in support of the application, to be true.

The other, and the more important objection is, that a suit is now pending between Rawson and Dole, in the prosecution of which all the facts and circumstances, relating to the escape, will be fully developed and examined, and every object attained, for which the information is intended.

Rule denied.

STUART *against* RICH.

Under the act incorporating the first company of the great Western turnpike road, full toll is payable, though the person has travelled the road less than 10 miles.

ON *certiorari*. The plaintiff was a toll gatherer at one of the gates erected under the act passed the 15th March, 1799, entitled "An act to establish a turnpike corporation, for improving the state road from the house of John Weaver, in Water Vliet, to Cherry Valley," incorporating the first company of the great Western turnpike road.

By a clause in the 10th section of the law, it is provided that no gates or turnpikes (except a turnpike on a bridge before mentioned) shall be erected at a distance less than ten miles from the other. The 11th section enacts, "That as soon as the whole, or any part of the said road shall be completed, and permission to erect a gate or gates as aforesaid, be granted, the president and directors may appoint toll gatherers, to collect and receive of and from all and every person or persons, using the said road, the tolls at

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duties hereinafter mentioned, *and no more*; that is to say *any number of miles not less than ten in length of said road*, the following sums of money, *and so in proportion for any greater or lesser distance, to wit: for every score," &c.*

Under the 15th section, a penalty of five dollars is imposed on any toll-gatherer who shall receive more toll than is established by the act: to be sued for before any justice of the peace of the county in which the offence shall be committed, for the use of the party injured.

Upon this clause, seven actions had been instituted below, against the present plaintiff, and recoveries obtained in all, for receiving at his gate full toll from travellers who had not passed ten miles on the road.

[*183] *It was now submitted to the court, whether the full toll was rightly taken, or, whether there should not have been a deduction made from it in proportion to the distance which the travellers had used the road, less than ten miles, according to the arithmetical rule, if ten miles give so much, what will seven and a half give?

If the court should decide in favor of the proportional deduction, the judgment to be affirmed; if against it, *et c.* for the now plaintiff, a reversal to be entered.

KENT, J., delivered the opinion of the court. The question submitted is, as to the true construction of the 11th section of the act, 2 Rev. Laws, p. 398. The gates on that road, except the one upon the Sooharie bridge, are all required to be *not less than ten miles from each other*, and the 11th section gives the toll therein established for *any number of miles not less than ten in length of said road, and so in proportion for any greater or lesser distance*. These last words can be satisfied, by applying them to the greater or lesser distance of the gates *above ten miles*. The gates may be twelve, or fifteen, or twenty miles apart, and then the toll is to be assessed ratably, according to the distance, which cannot, however, be less than ten miles. This construction is the only one that is reasonable, and it will sat

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isfy the words. The idea that the company must vary the toll at every ten mile gate, on the suggestion that a person has used the road for a less distance than ten miles is inadmissible, because impracticable. The toll-gatherer has no means of knowing whether the traveller has rode ten miles, or a less distance, previous to his arrival at the gate. If this suggestion was allowed to be a ground of reduction of toll, it would open a door to the greatest imposition and fraud upon the company, and it cannot be considered as within the meaning and spirit of the act, especially as the words can be satisfied by the other construction, which is a natural, just, and practicable construction. Judgment of reversal, therefore, must be entered.(a)

Judgment reversed.

***DRAKE and PINKNEY against ELWYN, and P. [*184]
and S. WITTAKER.**

Facts from which a partnership may be inferred are matter for a jury, and should be rebutted by contrary evidence. A signature by one of a firm in his name, and Co., is good to bind the other partners, though the firm has been always known by the name of another partner and Co., unless it be shown that there is such a distinct house as that by the style of which the bill or note is subscribed.

THIS case was submitted without argument. The facts and question are stated in the opinion of the court, which was delivered by

KENT, J. This is a suit against the defendants as co-partners in trade, under the firm of Elwyn & Co., on a note to the plaintiffs, subscribed by the said Elwyn, by the name of Elwyn & Co., and dated the 11th December 1800.

(a) ~~RANDOLPH~~ J., being a stockholder, gave no opinion.

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On the trial his signature to the note was proved, and it was admitted that Samuel Wittaker was a partner in the business with him, and the question that arose was, whether Peter Wittaker, the other defendant, was also a partner.

To prove this, the plaintiffs gave in evidence that all the defendants, about the fall of the year 1800, were together in a sloop on the Hudson river, having goods on board, and the said Peter being asked whether he was going to keep store, replied, *yes, we are going to try it*. That Peter Wittaker was frequently seen in the store with the other defendants, and was there *generally as much as the other defendants*, and he was once seen by a witness to draw spirits. That the store was sometimes called Wittaker's store, sometimes Elwyn's store, and sometimes Elwyn's and Wittaker's. That the said Peter is father to the defendant Samuel, and a very old man, unable to write. That after six months Elwyn became insolvent, and the partnership was dissolved, as it was understood from general report. That the said Peter told a witness who owed the co-partnership, that *he must pay to him and to no one else*. That it was *generally understood* that Peter was a partner, and that the son Samuel was only a clerk. That the said Peter spoke to a witness of the dissolution of the partnership as if he had been a partner, and mentioned that he was *in possession of the stock*, and that *the debts were to be paid to him*.

[*185] *There was no evidence that the defendants carried on trade under the firm of Elwyn & Co.

Upon this evidence the defendants moved for a nonsuit.

1. Because the plaintiffs had not proved a partnership between the three defendants.

2. Because the plaintiffs had not proved the existence of such a firm as John Elwyn & Co, or that the defendants were partners under that firm.

The court overruled the motion, and the question now submitted without argument is, whether the judge properly overruled that motion? if not, the nonsuit to be set aside.

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We think the evidence is sufficient to prove that the three defendants were in copartnership as traders at the time the note was given. At any rate, it was sufficient to let the point go to the jury, and to prevent a nonsuit. The only difficulty is, concerning the want of proof that Elwyn & Co. was the copartnership name. But as such a signature imported a copartnership, and a copartnership did exist at the time between Elwyn and the other defendants, I think it is to be presumed that such was the name of the firm, and that it was sufficient to cast upon the defendants the burden of proving what was the name of the house or firm, if a different name existed. They did not attempt to repel the presumption, and of course it belonged to the jury to consider of, and to draw that presumption. A third question arises, whether the note in question was given on a partnership transaction; but the same answer may be given to that as to the preceding question. The intendment is, that it was on a partnership account, and that intendment ought to have been repelled by the defendants, if not founded in truth.

Our opinion accordingly is, that the motion for a nonsuit was properly overruled, and that the defendants take nothing by their motion.

Judgment of nonsuit.(a)

(a) As partnerships may be created by parol, it necessarily follows, that circumstances are evidence of their existence and nature. See *Livingston v. Roosevelt*, 4 Johns. Rep. 251; *Peacock v. Peacock*, 2 Camp. 45; *Guidon v. Robson*, Ibid. 302. Therefore, the mere purchase of articles fit for the partnership business, though made by one partner only, and instantly converted to his own use, will bind the other, if there be no collusion between the buyer and seller. *Bond v. Gibson*, 1 Camp. 185. See *Manhattan Company v. Leeward*, *post*, 192, n. (a).

Bancroft v. White.

BANCROFT and Wife *against* WHITE.

A person holding under conveyances in fee deduced from the husband of the demandant in dower is estopped from controverting the seisin of the husband.

DOWER for lands and tenements in the town of Canaan, in the county of Columbia, claimed by the demandants, in right of the wife, and as the widow of Daniel Hawes.

[*186] *The parties agreed to the following statement of facts.

Daniel Hawes, the former husband of Lois Bancroft, one of the demandants, during the coverture, and for some years previous to, as well as on, the first day of November, in the year one thousand seven hundred and eighty-six was possessed of the premises holding, using, and improving the same in his own right, and not in the right of another; and being so possessed, did on the said fifth day of November, sell the same to one Jacob Brooker for two hundred pounds; and by deed of bargain and sale, bearing date the same day and year, in consideration of the said sum, conveyed the same to the said Jacob Brooker, in fee, with covenant of warranty.

The said Jacob Brooker entered by virtue of the said deed, and continued in possession until the execution of the deed next hereinafter mentioned, occupying in his own right.

On the eight day of June, one thousand seven hundred and ninety-five, Jacob Brooker and Hulda his wife, for the consideration of eight hundred and ten pounds, conveyed the aforesaid lands and tenements to Silvanus Gardner, in fee, with covenants of seisin and for quiet enjoyment, and containing also a release of dower by the wife.

The said Silvanus entered by virtue of the said deed, and continued to occupy in his own right until the twenty-third day of September, one thousand seven hundred and

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ninety nine, when the said Silvanus Gardner, and Anna his wife, by indenture, bearing date on that day, for the consideration of seven hundred and fifty pounds, conveyed the said lands and tenements (except thirty acres thereof) to Ichabod White, in fee, with covenants of seisin for quiet enjoyment and warranty; and the said Ichabod entered by virtue thereof, and has continued to occupy in his own right.

By an act of the legislature, entitled "An act for the sale and disposition of lands belonging to the people of this state, and for other purposes therein mentioned," passed the twenty-second day of March, one thousand seven hundred and ninety-one, it was enacted as follows, to wit: "That all the estate, right, interest, claim and demand *of the people of the state of New-York, of, [*187] in and to any lands, tenements or hereditaments, in the town of Canaan, in the county of Columbia, now possessed by any person or persons, shall be, and hereby is, granted to the *respective possessors* of such lands, tenements and hereditaments, and to the heirs and assigns of *such possessors* respectively for ever:" Provided always, that such possessor or possessors, shall be construed and taken to be the person or persons holding in *his or her own right*, and not occupying and improving in the right of another.

It was not usual in the conveyances of land in the town of Canaan, prior to the passing the above act, for the wives of the grantors to join in the deed.

Emott, for the demandants. The question for the consideration of the court is, whether, upon this statement of facts, the demandants are entitled to recover? We shall have to contend that they are.

In order to constitute a title to dower, three things are required by law; marriage, seisin and death. Co. Litt. 31, a.

The first and last are admitted; the second only is controverted. But this, however, we think sufficiently shown

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by the case. It appears that Hawes, the first husband, had a possession for a number of years, using the land as his own, not under any other person. He exercised ownership over it, in the most extensive and complete sense of the word, for he sold it, and that with a covenant of warranty. This, therefore, is enough to show seisin sufficient to entitle to dower; a claim ever favored in law. But should it not in strictness be enough to create a legal seisin, the defendant is estopped^(a) and can never be allowed to dispute our claim, for his title is derived through Hawes, the first husband of the demandant, and in his right it is that we claim. Against it, however, the act stated in the case is insisted. This act was passed to confirm, not to destroy rights, and that of the demandant is protected as well as those of the person in possession. The act operated by way of release and *mitter le droit*: the nature of which was to make valid not only the estate of the tenant, but that of every other person connected with it; [*188] *therefore, not only the estate of Brooker, but that of every other person connected with it. To this the case in *Shep. Touch.* 319, is in point. "A. disseises B. and leases for life to C. B. releases^(b) to A. it is good for C." Not only the estate of the person in possession, but every one connected,^(c) with him is equally within its effect. But from the case it does not appear that the state had any right to release; if so, the seisin of Hawes must stand impeached.

Benson, contra. This case depends on considerations of a very peculiar nature; on the known circumstances attending the lands in Canaan, and the construction of the statute

(a) *Jackson ex dem. Ostrander v. Hasbrouck*, 3 Johns. Rep. 331; *Strutt v. Bevington*, 5 Esp. Rep. 58.

(b) The word is confirm. The reasoning is this; by the disseisin a tortious fee is gained: if then the disseisor leases for life, he retains the reversion, and if the reversion be confirmed, the lease for life is so of course. The same law of release of all right. *Litt. a.* 449, fol. 266, b.

(c) This is too general. Every one through whose estate he derives title is confirmed.

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recited in the case. What seisin now is, is a question. The case in Burrow*, *Taylor, ex dem. Atkyns v. Horle*, shows what amounts to a seisin, under the ideas now entertained. A possession is not a seisin and yet that is all the seisin here. In that sense of the word Hawes may be said to have been seised, but in *Truesdale's Case* the court took notice that the whole county of Kings was taken possession of merely by occupancy. The case states, that Hawes held merely as his own, and not in or by another. The whole country was deemed vacant, and any one took possession.

This was the view in which it was beheld by government, and, therefore, in 1791, they passed the law recited. The effect of this was to take no notice of prior occupancies, such as Hawes's, but to confirm to such as were then in possession, and who were no longer considered as usurpers. Had Hawes derived his title under the patent he would not have been touched by the act; as he did not, it must be presumed he had only a title by occupancy, and when he relinquished that to another, that other was confirmed against every one else, as Hawes himself would have been. The law was intended to meet cases where the right was by occupancy only. Truesdale entered on a piece of ground supposed to have been vacant; he then moved away; some one *then entered on the same land, [*189] upon which Truesdale brought an ejectment, but this court held he could not recover, because he could not have entered *animo possidendi*.

In 1798, when Hawes took possession, it was vacant land. The reason why his widow is considered as not entitled to dower, is, that his estate was merely that of occupancy and not a seisin. In any other case but that of lands so circumstanced, it might possibly have been a seisin, but here it could not be; for the whole was a usurpation and a mere occupancy. To this, therefore, the law of seisin is not applicable. The conveyance and clause of warranty from Hawes, can work no estoppel upon us, Hawes having had possession, might have been deemed en-

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titled to a right of entry, and then the warranty was no more than a measure of prudence. It is probable he never sold more than his improvements, as was the custom in that country, and it was inserted merely to have evidence of a better title than that usually given, which was a parol sale of the improvements. Of all these facts the court will take notice, as they did in *Truesdale's Case*: the present statement does not say the land was granted, and, therefore, the occupancy, and the general circumstances of the country, must be inferred to apply.

Emott, in reply. From what is stated of *Truesdale's Case*, it is evident that he was a mere occupant—a squatter: here a title is deduced by conveyance, which, as it is in fee, a seisin must be presumed, and this circumstance distinguishes it from *Truesdale's*. Possession, in all cases, is evidence of right, and as Hawes's was relinquished after formal conveyance, the court will not presume otherwise, because we have it not in our power to produce the title deeds from whence he claimed. The widow has them not; they go to the heir, or the purchaser; and as her's is a favored title, unless they are produced, the court will not infer her husband had no right, or that he was a mere occupant. It is stated that Hawes held in his own right, and this negatives that of any other person. He exercised an act of ownership, and what he did, being in his own right, is inconsistent with that of any in the State. If, in any case, possession will warrant an inference of seisin, it will here. *White cannot controvert the title of Hawes; a bargainee, by mesne conveyances coming in under the husband, is estopped from denying the right of the wife, and must admit it. That the state has any claim can admit of little doubt. The act is to confirm previous rights, and must be so construed as to effectuate that intent. Suppose this the case of a base fee, and before the condition was broken; the act had passed; would the breach of the condition afterwards alter the right

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of the donor? Besides, the state does not appear to have any interest, and it cannot be presumed. If the fact be so, it ought to have been in the case, which, as it now stands, we have clearly made out.

KENT, J., delivered the opinion of the court. The former husband of the demandant, for some years previous to the 1st November, 1786, was possessed of the premises, and used them as his own, and not in the right of another. He then, for a valuable consideration, conveyed the same in fee with a covenant of warranty, and the lands have passed, by subsequent conveyances in fee to the present tenant. This is sufficient evidence, in the first instance, of seisin in the husband. The wife is not bound to produce her husband's deeds, because it is not presumed to be in her power, and in the present case, the tenant claims in fee, under title derived from the husband.[1] The marriage and death of the husband being admitted, there is no question in the case. The court are not to regard lands in the town of Canaan as an exception to the general rules, which would apply, in case the suit had been for lands in another town, nor was the case of *Truesdale v. Jefferies*,^(a) which

[1] See *Brown v. Potter*, 17 Wend. 164; *Carpenter v. Weeks*, 2 Hill, 341; *Sherwood v. Vandenburg*, 2 Id. 333; *Jackson v. Walker*, 5 Cow. 301; *Sparrow v. Kingman*, 1 Cow. 242.

(a) Report of the case of *Truesdale v. Jefferies*, as read in giving the above opinion. This was an ejectment for lands in Canaan and Chatham, (formerly King's district) in Columbia county, and was argued and decided in April term, 1798. The evidence was, that 18 or 20 years before the trial, the lessee was in possession and continued therein above three years; that he quit- ted the premises, and one Richmond occupied them; that he returned again into possession, and remained perhaps a year; that a controversy arose between him and one Knapp, when he quitted the possession and Knapp entered, and remained in possession until his death; that Knapp died in possession, leaving a widow and four children; that the defendant married the widow, and had been seven or eight years in possession, and held adversely. The plaintiff then gave in evidence the act of 25th July, 1782, and the de- mandant the act of 22d March, 1791. The act of 1782 stated, that fear and uneasiness prevailed among the inhabitants of King's district, by reason of pretences that the whole, or part of the lands, were vacant; and, for remov-

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was cited upon the argument, decided upon the ground of such an exception.

Judgment for the demandant.(a)

[*191] *WAY against CAREY, Administrator, &c.

A justice's court has no jurisdiction in a suit by an administrator.

THIS was a cause in which the only question raised was submitted to the court without argument.

RADCLIFF, J., now delivered their opinion. This is a case on *certiorari* to a justice's court. The error assigned

ing such fear and uneasinesses, it was enacted, that the interest or right of any person to any lands within the said district, and not within any colonial grant, should not be impeached, by reason that the same were not before granted. The court decided that the construction of the act of 1782 was, that it amounted only to a legislative declaration that those lands should not be located; that the possession of the plaintiff was of no avail, for he entered without claiming title, and relied solely on his possession; that, from his subsequent conduct, he must be presumed to have renounced or abandoned his possession, and all claim under it, and (to use a common, but appropriate expression,) he was to be regarded, in respect to the premises, as a mere squatter. Judgment for defendant.

(a) The general principle is, that all who derive title under or through the husband, are estopped from controverting his seisin. Therefore, where a tenant under a mortgagor took from his heir a release, and paid off the mortgage, it was held that the tenant could not dispute the seisin of the mortgagor, and that his widow was entitled to dower. *Hitchcock v. Harrington*, 6 Johns. Rep. 290. The law is the same in favor of the wife of the alienee of the mortgagor, whose right to dower for the want of seisin in her husband, cannot be impeached by a person deriving his title under a grant from the alienee, though the mortgage was then outstanding. *Collins v. Terry*, 7 Johns. Rep. 274. An acknowledgment by the defendant that he holds under the will of a grantor, who conveyed to the husband of the demandant in fee, and subsequently re-purchased the land so conveyed, is a recognition of the seisin of the husband. *Embres v. Ellis*, 2 Johns. Rep. 119.

See also *Hitchcock v. Carpenter*, 9 J. R. 344; *Davis v. Darrow*, 12 Wend. 65; *Prouse v. Potter*, 17 Wend. 164; *Sherwood v. Vandenburg*, 2 Hill, 702; *Contra—Sparrow v. Kingman*, 2 Cow. 242.

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is, that the plaintiff below sued in the capacity of administrator, and that the justice had no jurisdiction to try any action in which an administrator is a party. The question was submitted by consent without argument.

In the case of *Wells v. Newkerk*, Executor of Persen, this point was decided against the jurisdiction of the justice. We considered the act from which he derived his authority as applicable only to cases in which the parties appeared in their own right, and not to those in which they appeared in *auter droit*. It is unnecessary to repeat all the grounds of that opinion.

Since that decision, (which was made in January, 1800,) the legislature, when passing the revised act concerning justices' courts, added a section by which, in conformity to the principle of that decision, they denied the jurisdiction of the justice in suits against an executor or administrator, but were silent as to suits in *their favor*. From this it might be supposed the legislature meant that suits in their favor might be sustained before a justice. But no such authority can be admitted by inference or implication, and the act ought not to be construed to introduce a different rule.

The decision in *Wells v. Newkerk*(a) is not, therefore, affected by this act, and the rule continues that the justice has no jurisdiction. For this cause, we are of opinion that the judgment be reversed.

Judgment of reversal.(b)

(a) Since reported, 1 John. Cases, 228.

(b) By the act for the more speedy recovery of debts to the value of 25 dollars, passed 11th April, 1803, sess. 30, c 204, s 1, Laws of N. Y., vol. V. p. 316, in actions by executors and administrators jurisdiction is given to the justice's court.

Manhattan Company v. Ledyard.

[*192] *THE PRESIDENT and DIRECTORS OF THE MANHATTAN COMPANY *against* LEDYARD and LEDYARD.

An endorsement in the name of a firm, by a partner, is good, and may be declared on as the endorsement of the firm.

THIS case was submitted without argument.

RADCLIFF, J., now delivered the opinion of the court. This is an action by the plaintiffs, as endorsees of a promissory note made by Brown, Talbot & Co., to the defendants for 488 dollars and 17 cents, and endorsed by them to the plaintiffs.

The declaration avers, that James Brown, William Talbot and John Goodere, acting under the firm of Brown, Talbot & Co., made the note in question, the proper name and firm of Brown, Talbot & Co. being thereunto subscribed; and that the defendants being partners, under the firm of Austin Ledyard & Co., endorsed the said note in writing, the proper name and style of the said firm of Austin Ledyard & Co. being thereunto subscribed. The other parts of the declaration are in the usual form.

The partnerships of the makers and endorsees of the note, and the making and endorsing of the same, as above set forth, are admitted.

The evidence on the trial was, that Brown, one of the makers, subscribed the note by the partnership firm, and that Austin Ledyard, one of the firm of Austin Ledyard & Co., endorsed the same with the name of that firm. The question submitted by the parties is, whether the evidence supports the averments contained in the declaration.

We have no doubt that the averments were sufficiently supported by this evidence. It was not necessary to set forth, that one of the partners of each of the firms made and endorsed the note in the name or style of the respec-

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tive partnerships.(a) Although made and endorsed by one of the partners of each house, the legal effect was the same, and it is in all cases sufficient to set forth a writing according to its legal effect or operation. We are, therefore, of opinion that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

HILDRETH against ELLICE.

¶ a sheriff levy on lands, he will be entitled to his full poundage on the sum endorsed, though, in consequence of an amicable settlement, he do not sell.

THIS was an action by the late sheriff of the county of Montgomery, for fees due on a *testatum fieri facias*, at the suit of the defendant against one Calvin Young.

*In July vacation, 1793, a *testatum fieri facias* [*193] issued in favor of the defendant against Calvin Young, directed and delivered to the plaintiff, as then she-

(a) The safest way of stating an act is according to its legal effect. When that is done, a variation in evidence from the manner in which it is set forth to have been performed, is immaterial, if the effect of that proved be the same. Therefore, an averment that "A. B. & Co." accepted a bill, is supported by an acceptance "for A. B. & Co, C. D.," who was their agent. *Heys v. Heslaine*, 2 Camp. 604. For *qui facit per alium, facit per se*. So, an averment that the defendants made the bill, "their own proper hands being thereto subscribed," is supported by the signature of one of a firm, in the name of himself "and Co." *Jones v. Mars and another*, 2 Camp. 305. Because the hand of one is equivalent to the "hands" of all. *Gahway v. Matthews*, 1 Camp. 403. But an averment that the defendant endorsed the bill, "his own proper hand being thereto subscribed," is not maintained, it has been ruled, by evidence of an endorsement by procuration. *Levy v. Wilson*, 5 Rep. 180. Lord *Ellenborough*, however, thought that an endorsement by the wife in the name of her husband might support an averment of the husband's "own proper hand being thereto subscribed;" at all events, that no objection could on that account be taken by the defendant, after a promise to pay, with a knowledge of the fact. *Helmley v. Loader*, 2 Camp. 450

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riff of the county of Montgomery, and endorsed as follows: "Levy 7,500 dollars, with interest from the 24th of January, 1796, and 22 dollars and 59 cents costs, besides your fees." The writ was transmitted to the plaintiff in a letter from the attorney of the defendant, containing the following directions: "Enclosed I send you an execution against Calvin Young, for a large sum of money. He purchased a piece of land from the plaintiff, situate in the east part of your county, near Mayfield, if my information is correct. Your attention to the within will oblige your obedient," &c.

After the receipt of the writ, and before its return, the plaintiff levied on the goods and chattels of Young, to a small amount, and also went to the land, as above pointed out to him, and made a seizure thereof; but, before the return day of the writ, the plaintiff was requested to delay the sale of the property so seized, the parties in the suit having settled the execution.

The plaintiff neither returned the writ nor sold the property seized by virtue of it.

On this statement of facts it was submitted to the court, whether the plaintiff was entitled to fees for the whole amount endorsed on such execution, or for any other, and what sum?

It was admitted that the value of the land seized was equal to the amount of the sum ordered to be levied on the execution, and that Young had also given to the defendant a mortgage to secure payment of it.

THOMPSON, J., delivered the decision of the court. We think the sheriff is entitled to his full poundage on the sum directed to be levied. The case of *Alchin v. Wells*, 5 Term Rep. 471, so far as it may be regarded as an authority here, is directly in point. The court there decided, that if a sheriff levy under a *f. fz.* he is unquestionably entitled to his poundage, though the parties compromise before he sells any of the defendant's goods. The stat. 29 Eliz.

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a. 4, under which *this decision was made, and [*194] our act correspond in every essential part, as to the plaintiff's right to poundage. Our act regulating sheriffs' fees says, "serving an execution for, or under 250 dollars, two cents and four mills per dollar, and for every dollar more than 250 dollars, one cent and two mills." But in order to guard against the sheriff's taking poundage for the sum contained in the body of the execution, where the judgment is upon a penalty, (as in the present case,) or where he is not able to find property sufficient to satisfy the execution, the act further declares, "the poundage on writs of *fi. facias*, and all other writs for levying moneys, to be taken only for the sum levied." The true construction to be given to the act, I think, is, that where the sheriff proceeds to sell, he is entitled to his poundage only on the sum actually raised. And wherever the plaintiff interposes, and a compromise takes place, he is entitled to poundage on the sum realized by the plaintiff, or that might have been collected from the property levied on. To say that a sheriff should be entitled to no poundage where a compromise takes place, would be manifestly unjust. He may have incurred all the risk and responsibility, for the safe keeping of the property, and it will then be in the power of the parties to deprive him of compensation for it. It may be said, there is no risk where the levy is on land; this may be true; but it is observable, that perhaps in nine tenths of the cases, the money on execution is raised out of personal property, and the act makes no distinction. Suppose on the very day of sale, and before the vendue commences, the defendant should pay the sheriff the money, would he not be entitled to his poundage? and I can see no material distinction, whether the money be paid to the plaintiff or the sheriff, in that stage of the business. Cases, no doubt, may be supposed, where the sheriff will receive more than a valuable consideration for his services. But we think much less injustice will be done by adopting the rule we have laid down, than to say the sheriff shall

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be deprived of all his poundage wherever a compromise takes place.

LIVINGSTON, J. I cannot concur in the opinion just given. It is only on the *service* of a *fieri facias* [*195] that the *sheriff is entitled to poundage, and as the service is not complete until an actual sale of the property, he cannot until then have any right to this fee. Nor is there any greater hardship in this, than in countermanding a writ against the person before service, in which case the officer loses his fee, although he may have been several times to the defendant's house to arrest him. Unless the legislature have, by expressions not to be misunderstood, allowed poundage in cases of this kind, we should refuse it, as it will lead to great oppression, and the reward in many cases will be very disproportioned to the service. An angry plaintiff may instantly after judgment issue an execution for no other purpose than exposing the defendant to this expense, although he may have every reason to believe that the latter intended shortly to pay the debt.

This he would be under no temptation of doing, if the defendant, at any time previous to a sale, could protect himself against this charge. But it is thought hard to permit the party to settle after lands have been seized, without paying the sheriff his whole poundage. This supposes the seizing of lands, or taking them in execution, to be a work of immense labor and trouble. The truth is, that lands are often advertised without the sheriff or his deputies ever seeing them, and the trouble of an actual seizure consists only in riding to the lands and proclaiming that he takes them in execution. And yet, for this paltry service, not equal to that of arresting the person, he may be entitled, on a heavy judgment, to a most enormous reward. If we do not make the proceeds on an actual sale our only guide in estimating poundage, how shall we ascertain the value of the property seized; or who can say, that on a second

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the ~~what value would~~ have been produced; and if we allow the sheriff poundage here, as a *quantum meruit* for his trouble, why not give it to him if he seizes land by the plaintiff's direction. which, as is often the case, appears in the sequel not to belong to the defendant, or to be previously encumbered to its full value.

Having, then, little, if any doubt as to the intention of the legislature, who appear to have expressed themselves with great circumspection, not only by restricting the claim of *poundage to the *actual service* of an [*196] execution, but by declaring that it shall be taken only for the "*sum levied*," or, in other words, the sum actually *made* or brought into court, I think the sheriff not entitled to poundage for the lands taken by him on the execution issued in this case. Of the decision in 5 Term Rep. 470, it is sufficient to say, that it is not binding on us, and that the reasoning of the court neither satisfies me of the propriety of the thing, or that we have the power to make a provision for sheriffs different from that prescribed by the legislature (a)

Judgment for poundage on the sum endorsed.

MAGGRATH and HIGGINS *against* CHURCH.

All damage *immediately* arising from a jettison is to be contributed for, though it happen to perishable articles, which are enumerated in the memorandum, and remain in specie.

Freight and vessel are to be estimated in a general average, as they then are.

THIS was an action on a policy of insurance, in which, on a special verdict, the following facts were found.

"That Le Roy, Bayard and M'Evers, of New York, as

(a) A sheriff is entitled to poundage on serving a *ca. sa.* though the execution be unproductive from the defendant's subsequent discharge under an insolvent law. *Adams v. Hopkins*, 5 Johns. Rep. 252.

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agents for the plaintiffs, who were merchants in Madeira, by a policy of assurance, dated the 10th of September, 1798, insured 5,414 bushels of Indian corn, 4,000 pipe staves, 4,000 hogshead staves, and 2,500 quarter cask staves, from New York to Madeira, on board the snow Ann and Mary, Peter Murphy, commander. That the prime cost of the corn was 2,982 dollars and 98 cents, of the pipe staves, 170 dollars and 31 cents, of the hogshead staves, 95 dollars and 50 cents, of the quarter cask staves, 31 dollars and 12 cents. That the freight for the corn was to be 550*l. sterling*, for the staves, 148*l.* and that the plaintiffs had an interest on board, to the amount covered by the policy. That there was a memorandum in the policy, by which it was agreed that salt, grain of all kinds, Indian meal, and all other articles perishable in their own nature, should be warranted by the assured free from average, unless general. That the vessel, being well fitted for sea, sailed on the voyage insured, on the 17th of the same month; on the 21st encountered squally weather and heavy seas, which continued till the 26th of the same month, when about 1 o'clock P. M. the wind blowing violently, suddenly chopped round from E. S. E. to W. N. W. and laid the vessel on her beam ends, in which situation it became necessary for her preservation, and that of the cargo and crew, [*197] to cut away the mainmast. That in doing *this, it splintered off at, and below the partners, tearing away the piece of cloth called the coat, which is nailed to the deck and mast, for the purpose of keeping the water from running into the hold. That in consequence of this, as the sea made a free passage over the snow, a vast quantity of water continued to rush into the hold till the stump of the mast was cut off, and a new coat nailed over it. That this occupied about an hour and a half, when there were found four feet water in the hold, though one pump was continually going, the other having been carried away in the fall of the mast, and totally disabled. That the vessel laboring much with a heavy sea, it became necessary, on

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the 27th, to ease her, by throwing overboard about half the staves, which was accordingly done. That the weather having moderated, the snow was found to be in so disabled a situation, that she was obliged to bear away for the nearest port, three of the crew being crippled and sick, and the captain's leg very much bruised. That on the 18th of October following, the vessel got into the capes of Delaware, and on the seventeenth of the same month, arrived at Newcastle. That there were not to be procured there any stores in which to unload the cargo, nor any assistance to obtain repairs, and that the yellow fever then raged both at Wilmington and Philadelphia. That on the 25th or 26th of the same October, Le Roy, Bayard and M'Evers received information of the vessels being at Newcastle, and of all the antecedent circumstances, which they instantly communicated to the underwriters, and abandoned. That the vessel lay at Newcastle till the yellow fever abated, and on the 30th of October went up to Philadelphia. That on the abandonment, it was agreed that Le Roy, Bayard and M'Evers should send a clerk to Newcastle, to take charge of the cargo belonging to the plaintiffs, for account of whom it might concern, without prejudice to the rights of either party. That the vessel arrived at Philadelphia on the 30th of October, the day she left Newcastle. That on unlading the cargo, it was found so damaged as to be wholly unmerchantable, and that all the damage sustained by the corn was occasioned by, or in consequence of the cutting away the mast, which was done for the preservation of vessel, cargo *and crew. That the articles [*198] insured, excepting such as were ejected, were, by consent of parties, sold at Philadelphia, for the benefit of those who might be concerned, and produced, after deducting charges, 924 dollars, which sum was paid to the owners of the vessel, for freight, in pursuance of an award made by arbitrators chosen for that purpose, but the defendant was not a party to the submission. That the Ann and Mary was repaired at Philadelphia, and ready to take in a cargo

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on the 28th of November, but as no corn of the kind of that before purchased could be obtained, it being flint Jersey corn, the voyage was given up, and the vessel returned to New York."

If, on the above facts, the court should be of opinion, that the plaintiffs were entitled to recover as for a total loss, the jury assessed the damages at 1,231 dollars and 54 cents; if for a general average for the loss sustained by the injury done to the corn, then at 909 dollars and 61 cents; if for a particular average, at 237 dollars and 51 cents.

It was agreed that if, in estimating the general average, the freight of the cargo to Madeira ought to have been taken into account, and not the freight actually paid at Philadelphia only, then an alteration was to be made accordingly in the sum to be recovered: and that if the assured were not bound to look to the owners of the vessel for the proportion to be borne by the vessel and freight, then the loss to be considered as total.

In a former trial on the same policy, in which *Le Roy & Co.* were plaintiffs, the abandonment was, by the special verdict then given, found to have been made whilst the vessel lay at Philadelphia, where she could have been repaired for less than half her value, and the question at that time agitated between the parties was, whether the corn, being damaged more than one half of its value, was susceptible of abandonment, and the underwriter responsible; or whether he was protected by the words of the memorandum? It was contended that he was not, because they applied only to average losses, and not to those which were, like the present, total.

In support of this idea, the authority of the French writers was relied on; but the bench decided, if the subject insured be in existence, there cannot be a recovery.

However, there being still an average, occasioned by the jettison, for which the assurer was bound, it became [*199] necessary to settle that; but, before it could be adjusted, the defendant died.

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This induced the present action.

Harrison, for the plaintiffs, disclaimed all intention of impeaching the former determination, but distinguished the case now before the court from that which they had formerly adjudged, by remarking on the diversity of the verdicts, as to the periods of abandonment. He now made two points.

1st. That the plaintiffs had a right to abandon, whilst the vessel was at Newcastle, and had exercised that right.

2d That even if they had no such right, still the loss being occasioned by the jettison, it was to be paid for by a general average, and, therefore, the underwriter answerable.

It is, said he, a settled and acknowledged principle in the law of insurance, that whenever the voyage is lost, the assured has a right to abandon, though the article remain in specie. *Manning v. Newnham*, Park, 168, 169; 2 Marsh. 505.

This exists as well in cases of perishable articles, as in any others. *M'Andrews v. Vaughan*, 1 Marsh. 150. For the warranty "free from average," &c. does not destroy or impair the right to abandon. It only regulates the cases in which compensation for average shall be claimed. Upon these principles, it will be barely necessary to examine the circumstances, and see how fully they apply. The vessel is driven, with her cargo, into a port foreign to, and out of the course of, her destination; on hearing of this, and her disabled state, an abandonment instantly takes place. The right of the parties was then complete; the voyage could not be prosecuted, and it was impossible to know how long the incapacity to pursue it would continue. This would justify the abandonment then, and then the right of the assured was ascertained. This did not depend on the memorandum; the court, therefore, will see this is a case where the effect of the memorandum could not apply. In all cases there is a memorandum, yet it was never heard to work a difference in a loss, arising from a peril of the sea, in defeating the voyage.



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[*200] *The vessel arrived at Wilmington, where there were no stores, no possibility of repairs, or of prosecuting the voyage. Safely, then, may we say, with Lord Mansfield, "if, by a peril insured against, the voyage be lost, the assured may abandon." Because the cargo is composed of perishable articles, is it to remain forever at the risk of the underwritten? Has he no right to abandon, and call for indemnification? It is presumed that he has, and that the court will say he is not bound to wait for an eventual change of circumstances. If, in the case of an embargo, which may be taken off in two or three days, the right now contended for exists, and the assured, immediately on receiving advice, may abandon, will he not be entitled, in a case like the present, where the voyage is broken up? Surely this will be considered as a case within the spirit and letter of all the rules of abandonment. But admitting (which is not to be supposed) that the court should be of a contrary opinion, we have still to rely on the second position we have taken. That this is a loss arising from a general average, and we, therefore, in that point of view, entitled to recover. The special verdict finds, that the vessel met with gales of wind, which laid her on her beam ends, in consequence of which she was obliged to cut away her mast. That in doing this, the cloth round it called the coat was torn away, and considerable quantities of water rushed into the hold. That from this arose the injury to the corn, and that it was in consequence of cutting away the mast for the preservation of all. What is this but saying in so many words, that it was a loss arising immediately from the jettison? If so, we are entitled to recover for the whole of the injury attributed to it.

It is not the mere article thrown overboard that is to be made good, but everything is to be compensated for, that receives injury in consequence of the act done for the preservation of all. Abb. on Ship. 278; (See 1 Lex Mer Amer. 281, 286.) Therefore, the finding is conclusive on the fact, and the law is but a necessary consequence. But this very

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circumstance is to be urged as a reason for a new trial at least, and a question is to be made, in the present discussion, whether the jury, from *the testimony [*201] given, were justified in finding the effect of the jettison. It was no doubt proper for them, because facts must be submitted to their determination. There is no other cause stated in the evidence, which can account for the damage, but the jettison itself. The vessel was not leaky, nor was there any injury before. There is, then, sufficient stated to ascertain the origin of the damage. Having that before them, and nothing else, to which to attribute the loss, they had a right to infer the whole occasioned by the jettison, made for the preservation of vessel and cargo. That there was evidence adduced, that there was a person who had spoken to the captain, who had told him the damage was principally owing to the jettison, is immaterial. They ought not to have been influenced by mere hearsay. The captain himself ought to have been examined as to other causes; and what does he say? That, in his opinion, the jettison was the principal. It is impossible to discriminate between the same damage occasioned by other causes, and that which arose from the jettison. These declarations ought, therefore, to be laid totally out of view. The court may well imagine the captain mistaken; they will be warranted in saying there is no adequate cause assigned for the damage but the jettison, and that the jury have expressly found. The court will do well to consider if they ought to enter into nice disquisitions, where cause sufficient is suggested. There is no rule of discovery in these cases. If the party show sufficient cause, the jury ought to say they cannot examine every trifling injury; it is sufficient that this is the greatest. Will the court, on mere hearsay, open this cause, having no document to discriminate what part was injured under the policy and what not? Why was not the other side prepared to show the *quantum*? They had equal opportunity with the plaintiffs: we have given absolute evidence to satisfy the jury

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that the injury arose from the jettison exclusively; they rely on mere hearsay alone. If, then, the loss is the result of a jettison, this must be a general average, and, according to the statement in the verdict, the court will be of opinion that the parties are entitled to look for their proportion to the underwriters, and not to the owner. This, then, [*202] amounts to a total loss, *for it appears from the sales at Philadelphia, that the parties have lost the whole of the subject matter of the insurance.

Another question will then be made, as to the manner in which the average is to be computed. It will be contended, that if the average is general, another rule than that by which we have been guided, ought to be adopted. It has been settled, by estimating the articles according to the invoice; the ship on her value as it then was; and the freight on the amount to be then paid. It could not be taken at the sum due in Madeira, for she had not arrived. It is, therefore, to be charged with average on the amount then earned. That the arbitrators gave, and is the sum to be paid; they had no regard to what ought to have been received in Madeira. They, say what the articles sold for in the market, is your right, and that you are to have. But this was under an agreement that what was done should work no injury, and not to be as if taken on account of the proprietor of the cargo, but left with the owner of the vessel, merely to pay freight, and, therefore, as if on his account. In settling the average, he is allowed what he would have been entitled to where the corn was sold. On this ground the calculation was made, and this is to be considered as the just rule. For these reasons, we conclude that the party had a right to abandon, and that there was a total loss. If the court see the matter in the same light, there will be no need to consider it in any other point of view. Should they deem this not to be a case of abandonment, and that we are obliged to take to the subject; then the average, as fixed by the jury, ought to prevail, by rating the freight as received and the corn at the invoice price, not as it would

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have been at the place of destination. If the freight is thus to be estimated and averaged, why not the corn? If not so, the cargo would contribute more than the freight. But, at all events, as the loss of the corn is clearly a general average, the court will say we are entitled to recover as for a total loss.

Pendleton and *Hamilton*, contra. Before it can be known whether the case which was argued on a former occasion is not the *same as that now before the [*203] court, they will advert to it. If they will only take a short review of it, they will perceive that now agitated presents the very same subject, as to the right to abandon, with some slight differences, and a trifling variation in the arguments and points. The special verdict of this day only states the abandonment to be a little earlier, and in all other respects the testimony is totally alike. The defendant contends that this is not such a case of total loss as will warrant an abandonment. For this he relies on the former decision of the court, in *Le Roy, Bayard & McEvers v. Gouverneur*. The next question is, whether the plaintiffs are not entitled to recover the whole amount of the subject insured as for a total loss. Admitting that they have a right to recover for a general average, the inquiry will be what is it to be made for? General average is the contribution for that which sacrificed for the preservation of all. If the loss be applicable only to one, it is a particular charge. It must have been for the general benefit, and have had the effect of saving; for if by ejecting, goods be saved from one storm, and lost in another, they will not pay average, because they have not been saved.(a) The question is whether the whole value of the corn is to be brought into the general average. The facts stated in evidence, as connected with the special verdict, do not warrant

(a) If the goods be saved from the second peril, they shall contribute for an ejecting which has saved from a first danger, though the ship be lost in the second. See 1 Lex Mer. Amer. 230, and the authorities there.

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the conclusion that all the damage arose, as an inevitable consequence, from cutting away the mast. May not the injury be attributed to another cause? Did not a witness expressly testify, from the confession of master, mate and crew, it was only principally, and not exclusively owing to the cutting away, that the corn was injured? He was examined for no other purpose than to prevent the conclusion of the jury as to the source of damage. On the former argument it was never contended that the corn was to be made a subject of general average. This was an after-thought; an ingenuity of counsel to add the value of the corn to the general average, because it could not [*204] be recovered in any other way. *Therefore, the injury is now made an immediate consequence of cutting away the mast, and then the rule of law applies as to consequential loss, and right to contribution. But the verdict shows the storm had been making a breach over the vessel long before the mast was sacrificed, and there is no evidence that the vessel did not then ship some water: it is impossible she should not. But if the injury had arisen from and in the manner stated, does it come up to the position of counsel? According to this, every possible consequence of cutting away is to be a matter of general average; and, if so, every thing, however consequential, will be a loss within the meaning of the term. Should a captain, after a necessity to eject, be obliged to remove part of his cargo, if he place it where it receives damage, there would be a loss(a) and it must be considered as general average. But supposing the corn to be considered as general average, it is doubtful how the calculation ought to be made. The whole value is now considered as lost. This surely is not correct. Goods, even that are lost, are to contribute; not all, however, in the present case were so because there was to the amount of 900 dollars saved. This must be deducted from the amount to be brought into aver

(a) Though consequential, it would not be immediately so.

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age, and ought to be taken from the costs at the port of shipment. And though this was given for freight, yet it was no more than might be due, for the vessel was found to be able to proceed on her voyage; and surely the underwriter is not obliged to pay the amount of freight as a loss under the policy.

It is objected that the testimony, which goes to convert the conclusion of the jury as to the cause of damage, is only hearsay. It will be well worth while to consider by whom it was adduced. It was by a clerk of Le Roy & Co. sent by them as an agent, who related what their other agent, the captain, had said; he himself did not testify. This, therefore, was the declaration of their own agent, produced by themselves, and certainly from them at least, entitled to credit. He says the damage was principally owing to the cutting away the mast; the inference, therefore, is, it was not wholly. The two ideas are not convertible the one into the other. They are contradictions

*in terms; the jury, having no other data from [*205] whence to infer, must certainly have given their verdict against all evidence in the cause; it is impossible the jury could have drawn an inference from any facts there. Principally, it must be acknowledged, is a vague term, but it negatives the idea of wholly. It permitted the adoption of some loss from the cause alleged, but did not allow attributing the whole. A bare majority of the subject, a little more than half, could be intended under that view. How, then, would this operate? It is incumbent on the plaintiff to render the subject precise. Where he cannot, it turns to his own disadvantage. There is no criterion of facts. Principally is, in law, the greater part. There is no criterion for the jury to decide, except the word principally, which leads to no conclusion except something more than half. It is of considerable importance in the investigation of causes, as it relates to truth and justice, that too much latitude be not allowed to vague inferences. This often creates a disposition in the mind to draw conclusions

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from uncertain premises, and is a reason why we should confine it to strict deductions, and adopt a rule for it to govern itself. Inasmuch as there is no datum to determine the fact of how much, beyond half, was injured, the law will intend just more than half, and nothing less. It will not be permitted in the face of evidence that it was not wholly, that it was a little more than half, damaged, to say that it was wholly and entirely so. When a person who knows how much, pronounces principally, shall a jury say wholly? Are there any facts in the special verdict, from whence the jury can draw such an inference? From the 21st of the month to the 28th, the vessel was in a course of storms. Can this have produced no injury? A duration of five days' bad weather? Though possible, it is not probable such should have been the case. Then comes the jettison; and then the witness says he believes the principal part of the damage took place. But was there not something subsequent, from which the injury might be supposed to proceed? There was another storm, from whence it is impossible the injury should not have been increased: it [*206] could not have been repaired. If what took place the next day was the consequence of cutting away the mast, within their word principally, it may perhaps, be questionable whether some of this injury be not a subject of compensation. That which was immediate, is to be contributed for, 1 Mol. b. 2, c. 6, s. 7, not however, to go further than what directly ensues. But as there was another tempest immediately supervening, it is impossible to calculate the *quantum* of damage in one, and the *quantum* in the other, so as to ascertain the consequence which was immediate. In an interior view of this case, the jury appear to have lumped too much; to have added together what might be attributed to precedent and to subsequent causes; it is impossible to say the jury did not value the second tempest. The facts do not warrant their conclusion, and, therefore, they had no sufficient basis to overrule the captain's own declaration, that the whole injury was not from

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the jettison. He had every thing under his eye, and, therefore, must be the best judge whether all the damage arose from the first tempest. If the court think thus, the matter must be reviewed; they certainly will not say all, when the party, by his agent, says the reverse. In every case like this, the master is agent for every one concerned. It is not a case of total loss, in which he is the agent of the underwriter: in average losses he is the representative and deputy of each party insured. He has a duty to perform, and is responsible to them for its discharge. He is to collect the proportion to be contributed, from each his contributory share. He is bound to make this collection, and then distribute according to the general average: he is liable if he parts with the cargo before the contribution is settled. The result, then, necessarily is, that the party having a claim on him, must have recourse to him for the average, and call on the underwriter for the ultimate loss. That is, the difference between the injury sustained, and the sum he is entitled to receive from the defendant in this suit. On the one hand, the owner of the cargo had to receive for the injury done to the corn; on the other, the owner of the ship, for the injury done to that. It was a complicated fact of mutual contribution. The owner of the goods was *obliged to discount so [*207] much of his demand against the owner of the ship as the owner of the ship was entitled to receive from him and cannot ask the whole loss from us. Suppose he had a right to receive more for the corn lost, than he was bound to contribute for the injury done to the ship? He cannot come against the underwriter for the whole of what would be due for the damage, without this set-off. What he was to receive might be less than what he had to pay; can he have recourse to the underwriter for more than he did pay? On a total loss the underwriter is to pay a total loss; on a partial loss; and when there is a general average, the *quantum* ascertained on a just calculation among all the parties, for the assured ought to recover only the amount of the

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loss occasioned by the jettison, or other disaster, after deducting what he was entitled to receive in contribution from the other parties concerned in the voyage. The underwriter ought not to pay, when the assured has a subject on which he has a right to claim. From the insurer he ought not to recover, when his agent has in his hands a pledge, from whence it is to be taken. As to the arbitration, the defendant was no party to the submission, and, therefore, was not bound by it. The right to abandon must on the principle of *Le Roy and others v. Gouverneur*, be denied. As the value of the corn was not less than the freight, there could not, for that reason, also, be any ground for abandoning, especially as the vessel was repaired, and the owners willing to proceed.

Harrison, in reply. The former decision in a case acknowledged to be under this policy is greatly insisted on. Did this not essentially differ, the court would not now be addressed. When *that* was considered, the point *now* in contest, as to a total loss, never arose. The question *then* raised was, whether an abandonment could be made under circumstances very different from those which now present themselves? *Here* the act was justified from the local situation of the subject. *There* the ground was, that being injured to more than half the value, the party was entitled to abandon. The court must recollect that in *Le Roy v. Gouverneur*, the plaintiffs could not give in evidence the time when the abandonment was made, they only [*208] being able to do it, and as parties to the record, inadmissible. The time is not unimportant, as on it may depend the right of the party to a total or an average loss. For instance, suppose a capture, and the assured a day before he hears of the vessel's safety, abandon? It will be good. If he delayed till after receipt of the information, it would be nugatory. The court will never say that an abandonment, made when the party had a right to abandon, shall be impeached by the memorandum. It is not

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contended that when the vessel was at Newcastle, she could have been repaired, or stores had, or that the cargo could have been conveyed to its place of destination. At that period, then, it clearly was a total loss. Had the assured lain by, it would have been otherwise, but they did not; they took immediate advantage of their right, which did not rest on the memorandum, but on the right to abandon. *Goss v. Withers*, 2 Burr. 694.

The principle now contended for is, that whatever the cargo may be, or its situation, the right to abandon turns the loss on the insurer, and this point is not the one decided by the court.

The former consideration was, whether a deterioration, to more than half the value, authorized an abandonment? The consideration then turned on the distinction between the laws of England and France on that right. On this point both parties are agreed. But one question now is, whether this case ought to be sent back for examination to another jury? They were not to be bound by the relation of hearsay causes, said to have been acknowledged by the captain and others. They had facts before them, and from them they were justified in attributing the damage to either one cause or the other. Are there not facts in the case from whence a jury might say the loss arose from the jettison? There is nothing from whence they could infer it antecedent to the cutting away the masts. Allowing all that has been said respecting the word principally; that it means exactly a little more than half, the jury have decided on the credit due to it, and they have not thought it enough to outweigh the evidence of the damage, arising *solely* from the jettison. They find the cutting away the mast necessary *for the preservation of all, and the in- [*209] jury was an immediate direct consequence of that cutting away. This, then, is clearly a loss within the meaning of general average; and being of the whole, is a total loss. But here it is said we have no right to look in the first instance to the insurer: we must take from the captain

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and others, and then apply to the underwriter for the balance. Is it not, however, a loss from the perils of the sea, from a general average arising out of those perils? And will the court turn us round from the words of our policy to the captain, because it is said he has a lien on what was to pay us, and being our agent ought to have thus applied it? Can he justify holding the ship till the owner of goods ejected be paid? If he has not this power over the vessel, neither can he detain the cargo. Suppose my goods thrown overboard, the owner of the vessel a bankrupt. The captain does not perform this duty, and she sold by his assignees on her arrival, can the underwriters say you must look to the owner, the *casus foederis* has not taken place? All that can be done is to substitute the underwriter in our place, and he will have a right to use our names in the prosecution. It is from him we have to expect satisfaction. The court will find the principles on which the contribution has been settled to be correct; as our loss is of the whole, and as *that* is to be contributed for, we contend, both on the right to abandon, and on the settled rule of law in cases of general average, that we are entitled to resort to our policy, and leave the assurer to reimburse himself from the others.

KENT, J., (after stating the facts,) thus delivered the opinion of the court.

This cause comes before the court upon a special verdict.

[*210, 211] *Two questions have been made:

1. Whether the plaintiffs be not entitled to recover as for a total loss?

2. If not, then by what rule is a general average to be liquidated.

The first point was settled by this court, in the case of *Le Roy, Bayard & M' Evers v. Gouverneur*.^(a) That case

(a) Since reported, 1 Johns. Cases, 226.

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arose upon this same policy, and upon facts substantially the same. The question was on the construction of the *words in the memorandum, *free from average unless general*; and the court decided, that to make the insurer liable, there must be an actual destruction of the article specified in the memorandum, and not merely such a technical loss of the article as would authorize an abandonment. Consequently, as the corn existed in that instance, the insurer was not liable for it, however deteriorated it might have been by the perils of the sea.

This decision was warranted and governed by the case of *Cocking v. Fraser*,^(a) which was a strong and unanimous determination of the court of king's bench, upon a case reserved on the very point in question. In that case the insurance was upon a cargo of fish from Newfoundland, to a port of discharge in Portugal, and which was Figara. On the passage the crew hove overboard part of the fish, for the general preservation of the ship and cargo, and the ship was obliged to put into Lisbon, which was upwards of one hundred miles from her port of discharge. It was there found upon survey that the fish were rendered of no value, through sea damage, and the ship did not proceed on her voyage. The court held the insurer liable for no more than what he had paid into court as a general average on the cargo, and a particular average on the ship. Lord Mansfield observed, "that the insurer was liable only for a total loss, and that the total loss here was the loss of the thing itself, and not any damage, however great while it exists. That in common cases, when the voyage is obstructed and not worth pursuing, it is a total loss. But the memorandum goes on the idea that the insurer is not to be liable for any damage however great." Buller, J., observed also, "that the voyage being defeated, might be very material in cases not within the memorandum." This decision, therefore, goes the whole length of settling that.

(a) Park, 114; 1 Marsh. 144; Millar, 359; S. C. East. 25 Geo. III.

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although in certain cases a total loss may be in whatever *defeats* the voyage, and will authorize an abandonment, this will not hold in the case of perishable articles within the memorandum. The insurer *there* is secure against all damage to them, whether great or small; whether it *defeats* the voyage, or only diminishes the price of the goods.

The memorandum prevents the loss from being [*213] *total, unless the article be burnt, sunk, captured, or otherwise completely destroyed; and, considering the difficulty of ascertaining how much of the loss arose by the perils of the sea, and how much by the perishable nature of the commodity, and the impositions to which insurers would be liable in consequence of that difficulty, the rule of construction, as now settled, is the most salutary, by reason of its simplicity and certainty. This difficulty would remain in full force, if the law was otherwise, and the insurer was to be held for damage to the perishable articles, when that damage was so great as to occasion a loss of the voyage. One great object of the rule would, in such case, be defeated.

In delivering our judgment, I have been the more particular in explaining the former decision, and giving it my full acquiescence, from an impression which I received at the argument of this cause, that the decision was not sufficiently understood, or that it did not give all desirable satisfaction. The observation of Lord *Kenyon*, in the cause of *M'Andrews v. Vaughan*, 1 Marsh. 150, would seem also, as it stands at present without explanation, to be opposed to the rule we have adopted; for, he said the insurer was liable not only when the article was actually destroyed, but when the voyage was lost. If by this observation was meant that the insurer was held when the voyage was lost, by some cause or peril not arising from the condition of the articles in the memorandum, it is not contrary to the rule contended for; but if it is to be understood as extending to a loss of voyage, in consequence of damage, however great, to the articles in the memorandum, it is directly

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contrary to the decision of *Cocking v. Fraser*,^(a) and cannot be received at law.

It is to be observed that it is not stated in the verdict that *no other* vessel could be had at Newcastle to carry the cargo, but that the vessel in question could not there be repaired; and it is found that she was speedily repaired at Philadelphia, and was ready for the voyage, but that it was given up and deemed lost in consequence of the unmerchantable condition of the cargo, and because no other cargo of the like kind (it being Jersey flint corn) could be there obtained. This was evidently the *real cause* of the loss *of the voyage, and, therefore, neither [*214] this, nor the former decision, apply to the case of a loss of voyage from injuries *distinct from those happening to the perishable articles*, such, for instance, as an irreparable damage to the vessel. That would be a loss of voyage in a case *not within the memorandum*, and liable to be regulated by other rules.^(b)

(a) See *Burnett v. Kensington*, 7 D. & E. 222.

(b) Antecedently to the introduction of the memorandum, the insurer was responsible for any partial loss individually sustained by the subject of the insurance, under the words of the policy. To abridge this liability in the case of perishable articles, was the intention of the clause, "warranted free from average unless general;" because such commodities carrying within themselves the seeds of deterioration, it was very difficult to discriminate the partial injury induced by inherent causes, from such as might arise within the risks undertaken. If the words are construed as containing a warranty against all partial losses except that of general average, then the underwriter will be exempted from every partial loss which is not a general average. Of this opinion were Lord Mansfield and Mr. Justice Buller, (*Wilson v. Smith*, 3 Burr. 1550. *Mason v. Skurry*, Park, 160, and *Cocking v. Fraser*.) cited in the decision of the court in the text. If the words are to be taken as creating a condition, by which the insurer is warranted free from partial individual loss, "unless," or "if there be not" a general average, then on a case of general average happening, the policy will be restored to its original generality, and the assured let in to recover for the whole of his partial loss. Such was the construction first given in the English courts, (*Cantillon v. Lond. Ass.* cited 3 Burr. 1553,) and since confirmed on solemn argument in the last case on this question. *Burnett v. Kensington*, 7 D. & E. 210. The effect of considering the words an exception, is to reduce the memorandum to two risks; general average and stranding. Upon this latter event the

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As the plaintiff is not entitled to recover as for a total loss, the next point that arises for consideration is, whether the plaintiff be not entitled to recover a *general average, as fixed by the verdict.*

A question here preliminarily arises, and that is, whether the verdict be contrary to evidence in stating that "the whole of the damage sustained by the corn was occasioned by, or in consequence of, the cutting away the mast of the vessel, for the general preservation."

To support this finding, the evidence was, that in cutting away the mast, it splintered off at and below the partners, and tore away a piece of cloth which was nailed to the deck and mast; and by means of the splintering, and the removal of the cloth, vast quantities of water continued to rush into the hold of the vessel, until the stump of the mast was cut off, and a new coat nailed over the same, which occupied about an hour and a half; during all which time, and for several hours afterwards, the water made a free passage over the decks, and one pump was continually going, the other having been carried away, and become totally disabled, by the fall of the mast. In addition to these facts, there is the deposition of a witness, who heard the captain, mate, and crew say, that the damage the corn sustained, was principally in consequence of cutting away the mainmast, &c.

Upon these facts we are not dissatisfied with the conclusion drawn by the jury. No other cause of direct injury

whole of the embarrassments the clause was designed to obviate would present themselves; for it would perhaps be impossible to apportion the damage so as to separate the quantum arising in consequence of the stranding (for which the underwriter would be liable) from that proceeding from inherent causes, for which he would not be liable. If the principles of *Cantillon v. Lond. Ass.* and *Burnett v. Kensington*, be adopted, this difficulty is removed; for on the event of a general average, or a stranding, the whole amount of the partial loss is imputed to the perils insured against; if neither of those events takes place, it is attributed to inherent causes. The rule, however, which is laid down in *Cocking v. Fraser*, is that acknowledged by the case of *Maggrath v. Church*.

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to the corn is found. The one stated must have essentially injured the corn. The injury was inevitable, and the cause was sufficient to have produced the whole effect. We think the conclusion a reasonable one. We are, therefore, to consider the mast as sacrificed for the general safety of the ship and cargo, and that in the act of sacrificing the mast, *or, as a necessary consequence of [*215] it, the corn was damaged, and this damage must be included in a general contribution. The corn being damaged by the cutting away of the mast, is to be considered, equally with the mast, a sacrifice for the common benefit; a price of safety to the rest: and it is founded on the clearest equity, that all the property and interest saved, ought to contribute their due proportion to this sacrifice. The plaintiff is, therefore, entitled to recover as for a general average, for the loss sustained by the injury done to the corn, and two remaining questions are next to be settled. Abbott, 278; 1 East's Rep. 228, by Lawrence, J.; Park, 124.

The one is whether, in the adjustment of average, the freight of the cargo to Madeira ought to have been estimated, and not the freight only paid at Philadelphia. In this case, we think the adjustment, as settled by the award, ought to stand: for that the freight actually gained or earned in the voyage, and not what the vessel would have earned if she had gone to Madeira, ought to be the rule of contribution. Abbott, 291, 292; Marsh. 467.

The other question is, whether the totality of the contribution due to the plaintiffs, for the loss of their corn is recoverable in the first instance from the insurer.(a)

(a) So under the clause of "laboring, travelling," &c. the insurer on the ship is liable to the owner, for whatever charges and expenses he is in the first instance obliged to bear and pay, though the cargo be incidentally benefited. *Altier*, if the expenditure be totally for the cargo after the charge of the ship has ceased. *Watson v. Marine Insurance Company*, 7 Johns. Rep. 57. But where the insured on the vessel is also owner of the cargo, which and the freight are uninsured, the recovery from the underwriter, in case of a gene

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We are of opinion that it is, because the loss arises wholly from a peril within the policy, and the plaintiff has a right to look for his indemnity from the person who has engaged to indemnify him from the peril. This argument appears conclusive. This will not lead to a multiplicity of suits any more than a different rule; for if the plaintiffs could recover only a contributory share from the defendant, they would be compelled to resort to the owner of the ship for the residue; and this suit over may as well be brought by the insurer as the plaintiffs, for one great object of insurance is, promptly to re-invest the assured with his capital, lost by the perils of the sea, and thereby enable him to continue his commercial enterprises.

In addition to this, it appears to be the English practice for the insurer to pay, in the first instance, the adjusted average. Abbott, 296.

[*216] *We are, accordingly, of opinion, that the plaintiffs are entitled to recover a general average. That in adjusting this average, the freight has been properly estimated, and that the plaintiffs are not bound to look to the owner of the vessel for the proportion to be borne by the vessel and freight, and these points being established, the loss is to be considered as total, according to an agreement of the parties at the foot of the case.(a)

LEWIS, Ch. J. observed, he had delivered the opinion of the court in the case of *Le Roy, Bayard & M'Evers* against *Gouverneur*, on the same policy, and that as far as the present decision turned on the import of the exception free from average unless general, when applied to the corn, he fully assented to it. That the other questions arose upon an argument between the counsel, subjoined in a note

ral average, can be for no more than the proportion due from the ship. For it would be an absurdity to give the assured a right of action against the underwriter, merely to create one against himself. *Jumel v. Marine Insurance Company*, 7 Johns. Rep. 412.

(a) See *Nelson v. Columbian Insurance Company*, 3 Caines' Rep. 110, n.

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at the foot of the case, which had been omitted in copying the case delivered to him. He, therefore, had not considered them. He saw no objection, however, in concurring with the adjustment as to the *quantum* of freight to be charged with contribution to the general average; nor with the principle that the underwriters, and not the owners and shippers, were to respond, in the first instance, to the assured for the general average receivable on the corn, if entitled to any within the terms of the contract of indemnity. But that he had great doubts on the other point, viz., whether the injury received by the corn from the jettison of the mast, and the consequent irruption of the sea water, could entitle it to a general average as between insurer and insured. He was strongly inclined to think it within the spirit and meaning of the terms of the exception: the object and design of which was to avoid and shut out, between the parties to the policy, every question on the cause of injury to the corn, where it might equally arise from the perishable nature of the commodity, as from external causes. This was a case of that description, and actually involved the question the assurer intended to steer clear of. For the evidence was, that the injury sustained by the corn was principally owing to the sea water getting in through the partners, before the coat could be replaced. That it appeared to him rather an ingenious contrivance on the part *of the assured to obtain under the [*217] form of a general, what he could not under that of a particular average. He, however, gave no opinion.

LIVINGSTON, J. having been concerned in the cause, gave no opinion.

Judgment for the plaintiffs, according to the agreement on the case, as for a total loss.

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BARNEWALL *against* CHURCH.

A general policy, unaccompanied with any warranty, covers war risks of all kinds and of all countries. Under such circumstances, a false clearance is immaterial, and need not be disclosed. Seaworthiness is always implied, and not at the risk of the underwriter.
Weight of evidence.

THIS was an action for a total loss, by perils of the sea, under a policy of insurance on the ship *Hope*, valued at 8,000 dollars and dated the 28th of December, 1799, "at and from Kingston, in Jamaica, to Honduras, during her stay there, and at and from thence to New York." It appeared that in April 1789, the plaintiff, wishing to purchase the vessel in question, employed two shipcarpenters to examine her, which they did in every part. They bored her timbers fore and aft, near and between the chains, bends, transom, breast hooks, apron, and in other places, found her perfectly sound, and very strong. They reported her bottom to be of English elm, which never decays under water. That she was collier built, about nine or ten years old, and would last 40 or 50 years. That she seemed as sound as a Connecticut vessel of two years old. Her iron work was good, her bottom perfectly sound, her bends doubled, the first at least five inches thick, her knees not started, but well fastened, and the chain bolts forelocked.

On this representation, the plaintiff bought her, and expended about 600*l.* in repairs. Whilst these were completing, some of the timbers were perceived to be tainted, and some of the planks in her waist defective; the first were mended, and the latter removed.

After this the vessel sailed from New York, where she was purchased, to Kingston in Jamaica, from whence she sailed on the voyage insured, and arrived safely at Honduras. On her passage from thence to New York, she sprung a leak, was obliged to bear away for Honduras.

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which she reached in a very disabled state, and was, after a survey on her duly held, condemned as not seaworthy. From two protests of the captain, which were read in evidence by consent, it appeared that the vessel soon after *she left Honduras, experienced some heavy [*218] gales, but not such as to oblige him to strike top-gallant-masts, and hand his top-gallant-sails, though she, at this very time, sprung the leak which forced him, by the advice of his crew, to bear away. It was not, however, alleged, that any extraordinary press of sail had been necessarily carried to avoid a lee shore. The captain had, in his first protest, stated, that he had sailed from Honduras for Falmouth: in his second he explained it by saying that he had cleared out for Falmouth, but actually sailed for New York. This, it was proved in evidence, had been done to avoid duties to the amount of 105*l.* per ton, which must have been paid had the vessel cleared for any other than a British port: it was, however, established, that the thus clearing made no alteration in the premium, for the New York Insurance Company, after being acquainted with the circumstance, continued the risk on the policy they had underwritten, without demanding anything additional.

The state of the vessel, at the period of her survey and condemnation, was shown to the jury, from the return of a commission containing the evidence of the same persons, whose testimony, given on the survey, had been relied on by the plaintiffs, for proof of loss, and constituted a part of what had been adduced to the underwriters, in support of the claim against them. By this it was proved, that above two thirds of the ship's timbers were rotten, in consequence of which, and the decay of the fastenings, her planks had started, and several of them were also rotten; the bends in the same situation, and loose, particularly aft. That the defects in the timbers and upper works appeared to be of a considerable standing; the bends in particular were so bad that they might have been ripped up with a crow-bar, for twenty feet aft. Many of the treenails, chain bolts,

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and other fastening bolts, started; the bends totally so from the transom, and very much decayed. That the starting of the bolts and bends arose from the rotten state of the planks and timbers, which could not hold a nail. That the upper works, inside and out, were mostly decayed, her water ways open. That she could not have been a staunch, tight, strong and seaworthy vessel, fit for the voyage [*219] *on the 21st of November, 1799, (the day of her departure,) and her general decay could not have taken place between the time of her leaving New York, and that of her survey.

To discredit the evidence under the commission, and rebut the testimony it afforded, the plaintiff adduced the two ship-carpenters who had examined the vessel, and the master, who, previous to the purchase by the plaintiff, had last commanded her. The two first swore, they believed the persons examined under the commission had testified falsely, and the latter deposed that the vessel was staunch, tight, strong and seaworthy, when he left her, and in her former voyage had not made a pint of water. On this evidence the jury found for the plaintiff, as for a total loss.

A motion was now made for a new trial;

1. Because the verdict was against evidence, the vessel not being seaworthy when she sailed.
2. That she never sailed on the voyage insured.
3. That if she did, and was seaworthy, there was not a sufficient disclosure, she having cleared for Falmouth, and by that means increased the risk.

Pendleton, for the defendant. Without totally rejecting the evidence under the commission, it is impossible to reconcile the verdict with the state of the vessel. That a ship was seaworthy requires the strongest evidence to support it; it is not to be presumed that all are so, till the contrary is shown: but if this should be the rule, still it has been complied with. The testimony of want of seaworthiness could not have been resisted but by prejudiced minds;

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in this case, more than any other, it ought to have been conclusive.

The witnesses on the part of the defendant were first produced by the plaintiff himself, to substantiate his claim. Surely, no man shall present a person as credible, and when he has used him for such a purpose, immediately afterwards impeach his credit. By adducing him, a credit is given, which it is fraudulent afterwards to shake. The protest and survey go to establish the credit of the witnesses under the commission, and the facts they testify to, when interrogated on a solemn examination, corroborate, in every particular, the decayed and unseaworthy [*220] state of the vessel. They cannot be disbelieved without saying almost in express words, that they are perjured; they must be so, if the vessel was not as they have represented, and they unanimously state the loss to have arisen from the rotten, unseaworthy state of the ship. To contradict this, no one extrinsic circumstance, or accident is shown. There is not a single fact which could work an injury to the vessel: not even a lee shore stated to give a pretext for a press of sail, and consequent straining of the ship; but this could not have rotted her planks; it might have caused her to leak; yet that circumstance is otherwise satisfactorily accounted for, by her seams being open. It is singular the plaintiff should not have produced his captain; a man who must certainly have been able to give the fullest insight into all matters relative to the present question. The examination, previous to the purchase of the vessel, and subsequent report of the ship-carpenters, do not establish her seaworthiness. The same things happened with the Mills frigate. (Park, 122, 222.) Had the Hope been reparable, she might have obtained all that was necessary at Honduras. The only person who says it could not have been done is Williams, who never was there, whilst the man who had been, swears the reverse. The captain, too, deposes very equivocally; he states that he believes she was seaworthy when he sailed from New York, but not

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even a belief is mentioned when he left Honduras. Where there is evidence on both sides, the rule generally is, to let the verdict stand; but when it is against the weight of evidence, and some of the witnesses are foreigners, the court will give an opportunity of establishing their credit, especially in a case, like the present, of doubt and importance. The bias, too, of juries, in subjects of this sort, cannot be unknown to the court. On the second point, the defendant had strong reason to expect a verdict in his favor. The testimony of three persons evince the vessel sailed on a voyage to Falmouth, and not on one to New York. Though this latter is afterwards stated by the captain to have been the real voyage, it is to be remarked that he flatly [*221] contradicts himself, and was, at *the time of each assertion, equally upon his oath. If, indeed, he is to be believed, as to what he last says, the risk was increased: and if the vessel did sail on a different voyage than that insured, a new policy ought to have been effected, for the first was clearly void.

Troup referred the court to 2 Marsh. 364, as to the inefficacy of the survey and report made before the voyage, and Park, 192, 193, the last edition, for the *Ostend case*, (*Planche v. Fletcher*, Doug. 251,) in which the usage of trade was relied on.

Hamilton and *Harison*, for the plaintiff. The cause is one of those in which the court will grant a new trial with extreme caution. It is true it has, in one instance, been done; but in that the loss happened by the vessel's foundering at sea, without any circumstance by which it could possibly be accounted for. (See *Dow v. Smith*, ante, 34, note.) But though the accident should arise from any latent defect, a premium is, in fact, paid to insure against it. This will, on investigation, be found to be correct. The underwriter, in forming his calculation, considers the quantity of losses in proportion to the safe arrivals. On this *datum* he forms

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his estimate; seaworthiness must, therefore, be included. Of the number foundered at sea, many must have perished from latent defects, which ripping up alone would discover. Therefore, these must have constituted part of the risks calculated. If, then, the calculation be founded upon this, latent defects are paid for, and premiums actually received for them by the underwriter. If therefore she was seaworthy at the inception of the voyage, the progressive decay is at the risk of the underwriter. The interest of trade requires this mode of reasoning; for it is the policy of commerce to divide the weight of loss, and throw the load upon many, rather than upon one. To warrant, therefore, a new trial on this ground, it should appear clear and manifest, that the vessel was not seaworthy when the risk attached; that is, on her arrival at Kingston. There is not a particle of evidence to that effect. There was, therefore, abundant reason for the jury to deliberate, and to determine as they have done. The credibility of witnesses is also their exclusive province, and on this they have decided. That they might be fully *adequate to do so, a struck [*222] jury was obtained; and they, from their skill in navigation, aided by their general knowledge in mercantile transactions, have found the probability of truth on the side of the witnesses of the plaintiff. It is in evidence that the greatest exposure to danger, and possible increase of latent defects, would naturally arise at and from Honduras. She might, therefore, have been seaworthy at Kingston, and in coincidence with every circumstance, have become afterwards unfit. Her cargo, in her former voyage, was of a very heavy nature, and yet she never leaked a pint. The parts which are always the first to decay were bored, and found perfectly sound. Every single fact separately taken, proves her seaworthy at the commencement of the voyage. The period between her survey in New York and that in Honduras was only nine months; comparing the two reports, the jury discredited the last. But if they had not done so, still their verdict was well warranted, the loss

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arising from perils of the sea, deteriorating the vessel after the inception of her voyage, when she clearly was seaworthy. Therefore, we do not impeach the credit of our own witnesses, by the examination of the ship-carpenters residing here: we only show to what time their evidence relates; that it proves the loss during the time of the policy, though there may, perhaps, be some reason for supposing a little exaggeration in the description. In foreign ports, speculating surveys are sometimes to be found, where the hope of purchasing a vessel may induce her being condemned. The right of a jury is to weigh the credit of both foreign and domestic witnesses. The course of the navigation being through keys, demanded a press of sail; and this is another cause for finding that the loss and leak arose from perils of the sea. If there is a doubt in a case, as to the absolute origin of the disaster, the jury are to decide, and this they have done. The case of the Mills frigate is very distinguishable from this; the examination^(a) in that proved the vessel not seaworthy when she sailed on the voyage insured. On the second point, the only evidence that could be relied on was the captain's. He only could know the real [*223] destination of the vessel. The others spoke from the papers alone. The apparent contradiction is easily reconciled, and the explanation given in the second protest is substantiated by the owner's letters, which proved the voyage sailed on to be that which was insured. The object of the clearance to Falmouth is consistent with the known usage of trade, being merely to save the British duties. This very course of trade was relied on in the *Ostend Case*, (*Planche v. Fletcher*, Doug. 251,) and allowed to regulate the mode of clearing out. It has never been said that fallacious papers are fatal, when resorted to merely to give a commercial advantage to the assured. Besides, in this case, the rate of premium was not affected, nor indeed could it be; for as there was no warranty, it was a

(a) The examination there was, as here, at the place where she was condemned after previous examinations, finding her seaworthy.

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war risk, in which the underwriter guaranties against every species of loss which may arise from capture. False papers endanger only neutral policies but cannot enhance the risk of a belligerent insurance: and according to the decisions of this court, the present must be of that description.

That a cause is of importance, is by no means a reason for granting a new trial. It should also be difficult, and to render it otherwise, a probability of obtaining new lights, by a second investigation, should be made to appear. It is observable; too, that to prevent that very bias which is now urged as a reason for according the effect of the motion, a struck and select jury of persons pre-eminently qualified was empanelled. Whether a vessel be seaworthy or not, is a question of fact; and being so, the established maxim, that to matters of fact the jury shall answer, fully applies; for there is not one circumstance to make an exception of the present case, and induce the court to exercise their power of remanding the cause. Where the scales are nearly balanced, they should never be taken from the jury and carried to the bench. This is to destroy the most invaluable of our rights, and submit fact, as well as law to the judge. Suppose the case sent back, and then there should be verdict against verdict, as well as evidence against evidence, how long will the court be before it shall be satisfied which ought to *preponderate? That [*224] the vessel was seaworthy at the commencement of the voyage, is every way reasonable. Barnewall wanted to buy a sound ship; strong, tight and staunch, for the purposes of trade. He was solicitous she should be so, and his interest coincided with his wish. To ascertain the fact, she was critically examined in parts where she could not be sound if she was not seaworthy. This must have weighed with the jury, and they have found accordingly. Take the account given of her before, and just after her purchase, and see if it is possible that the return to the commission could be true? But to set aside this verdict, the court must go a step further than even the witnesses under it;

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they must say the vessel was not only not seaworthy at Honduras, but that she was not so at Jamaica. (*Marine Ins. Co. v. Wilson*, 3 Cranch, 187.)

They must go still further, and say none of the decay took place whilst at Jamaica, Honduras, or on the voyage. To constitute unseaworthiness, one or two defective timbers are not sufficient. The vessel must be in such a situation as to be unable to perform her voyage. Can this be said when the Hope left Jamaica? If not, the cause will not be sent back. Besides, there is no further evidence to be gotten. Therefore, there cannot be any new light thrown upon the subject. What is to be derived from the testimony under the commission ought, perhaps, to be received with great caution, if meant to affect the seaworthiness of the ship at the inception of her voyage. She had been a long time in a climate more than ordinarily deleterious to shipping; she had not been wafted from thence by halcyon gales, but had encountered, according to the second protest, violent winds and boisterous weather, under a press of sail, which made her labor, and after these events her state is described. These circumstances were doubtless taken into consideration by the jury, and it is impossible to send the case to them, under better circumstances than they have already had it. It may be alleged that we ought to have produced the captain; but the court will remember he is a seafaring man, and obliged to follow his profession. If, however, he was necessary, he certainly must have been more peculiarly so to the [*225] opposite side; and they have *not thought fit to produce him. The objection which has been made on account of the clearance vanishes before the circumstances of the case. That a vessel clears for a particular port is no proof of her being destined there. The contrary was declared in this case to the New York Insurance Company. It appears from the letter of instructions, the captain's protest, and every thing else, that it was entirely a New York transaction. The disclosure itself shows how

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unimportant it was: it did not affect the premium. The rule contended for, is to establish that a vessel insured to one port, to which the owner's declaration to one underwriter, the instructions and protest of her captain show she is destined, shall be vitiated by a clearance to another port, made for the sake of saving duties. The *Ostend Case* (*Planch v. Fletcher*, Doug. 251,) cited as authority for this is the very reverse. A clearance is never conclusive. 1 Marsh. 229, 231. It is the daily practice to clear out from foreign ports, as will best suit the voyage actually intended and this being a belligerent risk, devoid of all warranty, the hazards could not have been increased by a want of disclosure, had it in no degree been made.

Hoffman and Pendleton, in reply, This has already been stated to be a case of magnitude. It is so, not only from the sum in controversy, but from principle. It is peculiarly important, because, without examining the testimony and showing that a verdict has been pronounced on the most contradictory ever offered, it is now become almost a maxim for juries never to find a verdict for a defendant when unseaworthiness or usury are relied on in defence. On the very outset of the trial the jury betrayed a prejudice, on an idea that the insurer undertook to guarantee the seaworthiness of the vessel. The court now has to decide whether the testimony will justify the verdict. We admit that where circumstances speak one language, and witnesses another, circumstances are to be believed; but where two sets of witnesses speak contrary, and circumstances coincide with one set, the other must be disbelieved. Now the circumstances at the time of the survey, detailed under the commission, coincide with the evidence of Potts and others, that the vessel could not have been seaworthy when she left New York.

*This fact, then, is corroborated by extrinsic testimony, the weight of which is clearly with the defendant. To balance this as it is called, Middleton is ex [*226]

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... as to the state of the vessel in 1795. With as much property the builder might have been resorted to, and with such a latitude, it would be singular indeed if the vessel should not be proved seaworthy at some time or other, and the number of witnesses in process of examination rendered equal. That one circumstance relied on by the plaintiff should be literally true is impossible. That the ship did not make a pint of water, during her passage from England, neither your honors nor the jury could believe. It is what could not happen in even going to Albany. But even this was ten months previous to her purchase, and if true how came it that, at the expiration of that time, she wanted repairs to the amount of 600L? Notwithstanding which, Dorgan swears she was then fit to go a voyage round the world. If he and Middleton be taken away, then the number of witnesses will be eight to four; and where there is a contrariety of testimony, number ought certainly to prevail. The witnesses at Honduras demand, from their situation, more regard than those here. Dorgan had sold the vessel. Williams had a duty to perform, and is brought forward to swear to a fact which will prove it was faithfully discharged. Can there be a doubt, therefore, of the tendency to a bias? None of this can be imputed to the witnesses under the commission. Their testimony coincides with the survey; a survey taken by the plaintiff's captain, made use of by the plaintiff to substantiate his claim before the underwriters, used by him in evidence, and without which there is no proof of loss. It is singular that an argument should be raised by the plaintiff against testimony which he himself, through his own agent, the captain, has caused to be produced. But what is still more extraordinary, is, that when the survey is to be impeached, and the facts it contains discredited, the plaintiff's captain, who was present, and saw whether they were true or not, is passed by, and Williams, a New York ship-carpenter, called upon to negative them. This to be sure, he does pretty roundly, by asserting on oath, that all

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those who *were examined two thousand miles off, [*227] swore falsely to things before their eyes, which his never saw. The plaintiff never even examines his own correspondent at Honduras; but rests on a person *here* to contradict what passed *there*. The seaworthiness of the vessel is in no one point asserted by the captain in his protests. In neither does he show any adequate cause of decay. Giving the utmost extent to all he says, it could amount only to leaking, not to rottenness: to a rottenness which would not admit of repairs. Yet it is suggested she might have been perfectly seaworthy, staunch, tight and strong, when she left Jamaica, only nine weeks before. The clearance being false, rendered the vessel liable to be carried in for adjudication, and though she might not be ultimately condemned, it would subject her to further proof. The risk, therefore, was increased, and ought to have been made known. 1 Marsh. 232.

Had the vessel been met with by a French cruiser, she would, on account of her clearance from a British settlement to a British port, certainly have been carried in: so; had she been met by a British cruiser, steering a course different from her destination, it would have been attended with the same consequence. Wherever papers appear false and colorable, a neuter is in a worse situation than a belligerent. She is exposed not only to be captured by one party, but by all; for every nation is equally her enemy. If the court will refer to the doctrine of the admiralty, they will find this to be the law. The consequence is, that allowing the risk of the underwriter where there is no warranty, to be a war risk, this is greater than any war risk; because among hostile parties, there are some friends; but a neuter thus navigating has none, and a usage has not been proved.

Here it was observed by counsel, that the effect of colorable papers had never yet been the object of particular discussion, and that if the court was disposed to hear an argument on the subject, they wished to have another day

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appointed. This being accorded, the second argument was afterwards opened by

Troup, for the defendant. The question now is, whether the non-disclosure of the clearance being for Falmouth, *was a concealment of a material fact. If so, *that*, varying the risk, must, of course, avoid the policy. At the period when it was effected, and the voyage to be performed, Great Britain was involved in a war with France, Spain, and Holland. The consequences, therefore, of a false paper, would be different from those which would arise in a time of peace. It is a settled maxim of the laws of nations, that neutrals, to have the benefit of their neutrality, should, in every part of their conduct, proceed with the utmost good faith. All neutral ships are, therefore, to possess genuine papers. These are, on her being boarded at sea, the first objects of examination. If they present false or colorable appearances, it is on all sides deemed a sufficient reason for sending it for further examination. If discovered to be fraudulent, condemnation is sure to ensue: if fair, the only indulgence is to produce further proof of neutral character, on establishing of which, though acquitted, costs are invariably to be paid; for the belligerent is not in fault when the papers do not speak that which is true. The risk of interruption and detention is therefore enhanced by a false or colorable paper. Abbott, 184; 1 Mol. 329, b. 2, ch. 2, sec. 9; Coll. Jur. 135, 136; 1 Rob. Adm. Rep. 371, 377, 378, 124, 126, 165, 247, 248; 2 Rob. Adm. Rep. 158, 161, 349; 3 Rob. Adm. Rep. 77, 78, 80. The cases cited show that if there be an alternative destination, even *that* ought to be expressed. Here not even *that* form was complied with, but the clearance was positively and determinately false. A usage has been on a former day urged, but the court will look to the case, and none is *there* to be seen. If none, the underwriters could not presume the clearance would be to Falmouth. Had the vessel been met with by a French

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cruiser, the conclusion would, from her clearance, have been that she was, in fact, a British vessel with British *property*. This, then, is a risk and danger which, with fair papers, could not have been encountered.

The same would be the case let her be met with by what cruiser soever. Suppose even the letter of Barnewall discovered, what would then have been the conclusion? That she was an American vessel, carrying an English cargo. She was evidently in a trade authorizing seizure, running a *risk not contemplated, and, therefore, [*229] the underwriter entitled to say *non hæc in fœdera veni*. That no injury had ensued from this particular cause is immaterial, the concealment being fraudulently. *Rich v. Parker*, 7 D. & E. 708, 709, 710.

Harison and Hamilton, contra. The question is, whether the concealment be of a material fact. This certainly was a matter for jury determination. *M'Dowal v. Frazer*; *Shirley v. Wilkinson*, Park, 205, 206, 207. It ought not, therefore, now to avail. *Barber v. Fletcher* was exactly the same ground of application. Doug. 292. Had the fact been material, it ought to have been made an object of particular inquiry before the jury; and this not having been done it is now too late. This position the authorities cited will establish. *Planche v. Fletcher*, (1 Marsh. 345, 346,) evinces how little stress was laid upon the clearance. Lord Mansfield in that case says, the non-disclosure of the proclamation made no difference, for other underwriters insured afterwards at the same rate of premium. So here, the risk was continued without any advance of price; and on this very circumstance the jury probably have decided. The increased risk by the colorable clearance, allowing all that has been said, was within the policy. It was contemplated by the underwriter to embrace all belligerent risks; therefore, there could be no concealment of a risk which was purely belligerent, and comprehended in the premium. There was no warranty. Capture, then, was a risk within

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the policy, and the underwriter cannot, therefore, set up as a defence, that from this paper the vessel ran a risk of being taken. For, that he should indemnify against *this* was a part of the contract itself. It can never, therefore, be urged that there was a concealment of that which, from the nature of the agreement, is necessarily implied, and for which a premium must consequently have been paid. To explicitly communicate such circumstances is a refinement in the doctrine of disclosure, of perfectly novel invention. Under a general policy, for whomsoever it may concern, unaccompanied with warranty, it is unnecessary to state that the proprietor is belligerent. 2 Emer. 460: In *Woolbridge v. Boydell*, (Doug. 16,) the immateriality of the clearance is allowed; and in the present case it must be wholly so when every war risk was included.

[*230] *It is unnecessary elaborately to argue in support of that which a decision of the court has already settled. The policy covers every belligerent risk which could arise. It might be French, British, Spanish, or Dutch property, for every war peril is covered. If so, condemnation is insured against. The question then is, can any situation in which neutral property is placed, be attended with more dangerous consequences than when confessed to be that of an enemy in whose hands soever it may fall? Can the risk of being carried in for adjudication (which is all that is attempted to be established from the clearance) be greater than the certainty of condemnation against which the policy insures? The point cannot be argued more forcibly than by asking the question.

Pendleton, in reply. This case presents two questions; one general; the other particular. The general question is, whether a vessel having false documents relating to her voyage and destination, should not always forfeit the protection of the policy. It is of the utmost importance to neutrals to establish a character for good faith. False papers ought, therefore, to be discountenanced, from motives

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of public policy, as tending to corrupt the morals of the people, by inducing perjury and dishonorable speculations in covering property. It is settled that every thing increasing the hazard ought to be disclosed. The true inquiry then is, whether the paper might not have produced a hazard the vessel would not have been subject to without it? By the French ordinance of 1744, false papers are worse than either the want or destruction of them, and in the *Ostend Case*, it is to be remembered the usage was to have them false. They invariably subject to further proof. The answer to the Prussian memorial, and the case of the *De Hoop*, prove this. They even increase belligerent risks. For an enemy's property always receives protection from one side, but false papers take it away from all. A clearance is also a public document, and comes from public officers. It ought, therefore, to be genuine; neither a forgery, nor a falsehood, because it may implicate them. They are also applied to purposes of acknowledged fraud; to cheat the revenues of other countries; policy, [*231] therefore, would dictate the propriety of leaning against them, though the revenue codes of foreign nations are not noticed in our courts. Had the vessel been cleared for New York, she could have run no kind of risk of detention; therefore on the particular question, as relating to this cause, it enhanced the danger. *Rich v. Parker*, 7 D. & E. 705; 1 Esp. Rep. 615. And this, like a deviation, avoids the policy, not being qualified by any usage, either general or particular.

*THOMPSON, J.: The two questions arising [*232 233] out of this case for decision are,

1. Whether the verdict was against evidence, on the question of seaworthiness; and,

2. Whether the plaintiff ought not to have [*234] disclosed to the defendant that the vessel would have a clearance for Falmouth.

There is, in every insurance, an implied warranty that

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the ship shall be seaworthy when the risk commences; that she shall be tight, strong, and in all respects, fit for the intended voyage. The insurer undertakes only to indemnify against the extraordinary and unforeseen perils of the sea, and not against the ordinary perils to which every ship must be exposed in the usual course of the voyage proposed. If a vessel become incapable of proceeding on the voyage insured, the *presumption prima facie* is, that it arises from unseaworthiness, unless some adequate cause be shown to occasion the damage. But, if any such cause be shown, so that the loss may be *fairly* attributed to sea damage, and the underwriters mean to rely on the ship's not being seaworthy at her departure, the *onus probandi* will *then* lie on them. To test the present case by these rules, we find the only testimony, as to the immediate cause of the disaster, is that contained in the two protests. From the first, made by the master, chief mate, and one seaman, it appears that the vessel left Honduras the 27th of January. That on the 28th January, she met with strong gales, so that they were obliged to close reef the fore-topsail, and close reef the main-topsail. That on the 29th, strong gales, and a heavy sea from the northward, still under reefed sails, the vessel making much water. On the 30th the wind abated; and nothing remarkable occurred until the 2nd of February, when they found the leak increased to that degree that they could not keep her free from water with the pumps. They then bore away for Swan's Island, which being unable to reach, they determined to return to Honduras, where they arrived the 13th of February. During the above time, they encountered, at various periods, stiff gales and heavy squalls. Thus we find the ship, from the 28th of January until the 13th of February, a very considerable part of the time laboring under stiff gales and heavy weather, far beyond the ordinary perils of the sea. The master swears that shortly after leaving Honduras, he met with excessive hard winds; that the navigation was difficult and dangerous,

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and *he was obliged to carry a very heavy press [*285] of sail, in order to avoid the reefs and keys; and that after he had met with considerable injury, and it was determined again to return to Honduras, he experienced heavy gales, and various changes of weather. This I think sufficient to show that the loss may *be fairly* attributed to sea damage, and throw the *onus probandi* of unseaworthiness on the defendant. On this subject, the testimony is certainly very contradictory, and, in my opinion, irreconcilable. The implied warranty on the part of the assured is, that the vessel was seaworthy at the commencement of the risk; this was on the 21st of November, 1799, while she lay at Kingston. The testimony on the part of the plaintiff is, substantially, that in April, 1799, when he had it in contemplation to purchase this vessel, he procured ship-carpenters to examine her, and ascertain her situation, previous to completing the bargain; no possible inducement, therefore, to a fraud, on the part of the plaintiff. They examined her accurately, bored in places most liable to rot, and found her sound; stripped off her sheathing, found her bottom English elm, and perfectly sound; her naval hoods and head knees sound; took off the plank so as to examine her top timbers, and found them sound and good. The testimony of Captain Dorgan, likewise, who arrived in March preceding from the West Indies, in this ship, with a cargo of 500 hogsheads of sugar and molasses, tends to show that she was a very tight, strong vessel, and only ten years old. This, it is said, however, was seven months before the commencement of the present insurance. But if she was in the situation represented by these witnesses in April, it is inconceivable that she could be in the rotten and decayed state represented by the defendant's witnesses in November thereafter. The examination made by the defendant's witnesses was in February, 1800, three months after the commencement of the risk. All the progressive decay, therefore, from the November preceding, was at the risk of the underwriter. But it appears incred

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able that all this decay could have taken place in that period, for the defendant's witnesses represent that when she was surveyed by them, two thirds of her timbers [*236] were rotten, many of her plank started and rotten; her bends so rotten and loose that with a crow bar they might have been ript up for twenty feet; her upper works in a very bad state; and, in short, that there was a general decay of her timbers, bends, and plank. The master of the ship, however, swears, that had she arrived in any port on the continent of America, she might have been repaired, fit for the voyage, for fifteen hundred, or two thousand dollars; but if she had been in the situation represented by the defendant's witnesses, she must have been *irreparable*. On the whole, the testimony is so directly and palpably contradictory that it is impossible to reconcile it. It thus becomes a question of credibility of witnesses, and this is peculiarly within the province of a jury to determine. Whether the vessel was seaworthy or not, is also matter of fact, to be submitted to a jury. These points have been decided by a respectable jury of merchants; and in such case, where the question is doubtful, and the testimony contradictory, I think, the court ought not to interfere by granting a new trial, unless it appears that injustice has been done, or that further light may be thrown on the subject on another examination.

In the case of *Ashley v. Ashley*, 2 Strange, 1142, the judge who tried the cause (which was upon a promissory note for 5,000*l.* which the defendant insisted was forged) certified, that the weight of the evidence was with the plaintiff, and he thought the jury would have found for the plaintiff, but they found a verdict for the defendant. And on an application for a new trial, the court said, as there was evidence on the part of the defendant, the jury were proper judges to determine which scale preponderated; that it could not be said to be a verdict *against* evidence, and so refused to grant a new trial. The same rule was adopted in the case of *Smith v. Huggins*, 2 Strange, 1142, and a new trial de-

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nied, although the evidence was weak on the part of the plaintiff, and the judge who tried the cause strongly inclined against the verdict.

I am, therefore, of opinion, on the first point, that a new trial ought not to be granted.

With respect to the second question, I think there can be but little difficulty. There is no doubt but the real destination *of this vessel was for New York, [*237] as described in the policy, and not for Falmouth, as the clearance purported. There is no contradictory testimony on that subject, except, that in the first protest it is said, as in the clearance, she sailed for Falmouth and a market, but as to the *actual* place of destination of a vessel, I think the captain, unless his testimony is impeached, is entitled to full credit. He, of all others, is the most likely to know this fact; and he, when examined as to that point particularly, declares explicitly, that she sailed for New York, though her clearance was for Falmouth and a market; and in this he stands corroborated by the testimony of Alexander Anderson, the plaintiff's agent at Honduras. I, therefore, take it for granted, that the vessel sailed on the voyage insured. So far as any reasons could be discovered for taking out a clearance for Falmouth, it was to avoid the payment of certain charges, that would otherwise have been incurred at Honduras. There was no warranty or representation, and it has been settled in this court in the case of *Murray v. United Insurance Company*, (July term, 1800,) that in such cases, the underwriters take upon themselves war risks. Under a policy of *this description*, I cannot conceive how this clearance could, in any manner, prejudice the underwriter, or increase the risk; and, therefore, immaterial whether disclosed or not. In all the cases cited from Robinson's Adm. Rep., where false and colorable papers came under consideration, the question was, as to the neutrality of the property; the papers purporting a different voyage or owners from the other testimony, and so considered a circumstance of fraud and suspicion. But

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as the present insurance is general, and includes war risks, this clearance was immaterial.

I am, therefore, of opinion that judgment ought to be rendered for the plaintiff upon the verdict of the jury.

RADCLIFF, J. On the trial of this cause, the defendant rested his defence principally on the want of seaworthiness. This objection was relied upon in the argument for a new trial, and two other grounds were also taken, viz :

1. That the ship sailed from Honduras for Falmouth, and not on the voyage insured.

2. That there was not a sufficient disclosure.

['288] *I shall begin with considering the two points last mentioned.

As to the first of these, the evidence is, that the ship cleared at Honduras for Falmouth and a market. The captain and mate, and one of the seamen, who made the original protest, therein swore, that they sailed from Honduras, bound for Falmouth and a market. On this evidence alone, I should have no doubt that the voyage from Honduras ought to be considered as destined for Falmouth. But the captain, in his second protest, explained, that he in fact sailed for New York, although he cleared for Falmouth. How far this explanation can be reconciled with his former deposition in the first protest, or ought to be received without further proof to establish the fact of his sailing for New York, it is not important, under the circumstances of the present case, to decide. There is other evidence, to wit, the deposition of Alexander Anderson, and the letter of the plaintiff of the 3d of October, 1799, explaining the object of the clearance for Falmouth, which I think sufficient to justify the verdict, on the ground that the vessel actually sailed for New York.

2. Assuming the position, that the vessel was in fact bound for New York; the second point has been treated as more delicate and important. She was bound for New York, but cleared for Falmouth. It is not stated in the

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case whether the cargo was consigned to any person at New York, nor in what manner her other papers appeared. The objection is, therefore, founded on the clearance alone.

In considering this question, it is material to observe, that the insurance was general, without any warranty or representation that the property was neutral. It follows, according to the decision of this court, in the case of *Murray v. United Insurance Company*, that it extended to protect belligerent as well as neutral property. If the risk, therefore, was not increased beyond what it would have been in the case of belligerent property, the circumstance of a false paper, or a clearance for a port of one of the nations at war, could not be material. The underwriter must be deemed to have received the premium adequate to the risk, which this circumstance implies, and ought, therefore, to be liable. Besides, I think [*239] it too uncertain, and too great a refinement, to establish a rule that every paper, which, in the opinion of the cruisers of a belligerent nation, may be deemed suspicious, and induce them to carry in a vessel for adjudication, should be held necessary to be disclosed. It would be impossible to meet the ingenuity, or avoid the cupidity of that class of men, and prescribe a safe and practical rule on the subject.

3d. On the point of seaworthiness, there was much contrariety of evidence.

On the part of the defendant there appeared,—

1st. A survey of the vessel, made on her arrival at Honduras, by eight persons, at the instance of the captain, who certified, upon oath, that she was wholly defective in her timbers aloft, her upper works, inside and out, plank rotten, and otherwise generally decayed; that on account of these defects, and other injuries which she had received, she was, in their opinion, unseaworthy; and, from the difficulty of procuring workmen and materials, and the high price of labor and provisions, she was incapable of being

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repaired for her full value after the repairs should be completed.

2d. The depositions of four of the above persons, who made the survey, taken under a commission, who testify, generally, to the same effect. Three of them add, that they verily believe it was impossible the ship could have been seaworthy on the 21st of November, 1799, at which time she commenced the voyage insured. Two of the three last mentioned witnesses are ship-carpenters, and the third a mariner. The fourth is a merchant, and speaks with more diffidence of his knowledge of vessels, but says, that he firmly believes that some of her timbers had been rotten a long time.

In opposition to this the plaintiff produced,—

1st. The protest of E. Atkinson, the master, of the chief mate and one seaman, who swore, that when they sailed from Honduras, on the 27th of January, they firmly believed the ship was tight, staunch, and well fitted and provided for the voyage. The master, in a supplementary protest, again positively declared, that she *was* tight, staunch and strong, and well fitted for sea.

[*240] *2d. A deposition of Andrew Dorgan, who testified that he had been master of the ship immediately before the plaintiff purchased her, for the period of fourteen months; that during that time she was twice hove down and examined, and none of her timbers were found rotten or defective; that during all the time he sailed in her, he thought her as strong, staunch, and good a vessel as any he had ever sailed in, and when he left her, which was in April, 1799, she was, in his opinion, fit to go to any part of the world.

3d. The testimony of Thomas Williams, examined at the trial, and the deposition of William Peacock, two ship-carpenters of the city of New York. They examined the ship at the request of the plaintiff, previous to the purchase by him, in April, 1799, and reported her to be generally a sound and strong ship; after the purchase, they made some

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repairs to her, fitted her for sea, and had a full opportunity then to ascertain her real condition; they add, everything was done which was necessary to render her seaworthy, and that, after such repairs, she was perfectly sound in all her parts, and fit for any voyage. One of these witnesses, Thomas Williams, also said, that from the state of the ship when he repaired her in April, 1799, it was impossible she could be so decayed at the time of the survey at Honduras, as was represented by the surveyors there, and that, in his opinion, they must have sworn falsely.

4th. The testimony of Samuel Middleton, and one Bird, the plaintiff's clerk. The first of these proved, that he helped to repair the ship in the year 1795, and, from her condition at that time, he was fully of opinion that she could not have been so rotten as was stated in the survey, and the evidence taken at Honduras. Bird, the plaintiff's clerk, established, that the charges of the ship, after the purchase, and including her outfit, amounted to 3,040 dollars, and that the purchase-money was 5,000 dollars. He could not distinguish how much was expended for the repairs alone.

The defendant also produced one Rose, a witness, who was a captain of a ship, and had been often at Honduras since the year 1795. He testified that William Gibson, one of the surveyors, was a respectable merchant, and treasurer *of the settlement; that Thomas [*241] Potts, another of the surveyors, was one of the richest merchants there, but he knew nothing particularly respecting him. That he was acquainted with two of the other surveyors, but could say nothing of their character. This witness also said, that the vessel must have been very strong to carry the sail described in the protest, with a hard north wind, and he thought she could not have done it if the wind had been very high. Two other witnesses, judging from the sail she carried, also testified that in their opinion the weather could not have been so violent as to injure a sound and strong vessel.

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This was the principal evidence concerning the question of seaworthiness which was submitted to the jury as a fact to be determined by them. As that fact appears to have been generally submitted, I think it not material to examine the substance of the charge in other respects. But I take this opportunity to observe, that the opinions and directions of judges at the circuits, as made by the parties, appear, too frequently, very different, both in form and substance, from what they really were.

In the present case from the face of the charge, and the simple nature of the question under consideration, it is manifest, that it can neither be correct nor entire. This, however, appears to me unessential to the decision of the question between these parties. I view it as a question depending on the weight of contradictory evidence. The witnesses at Honduras had, do doubt, the best opportunity for correct information. They saw the vessel immediately after the disaster happened and examined her. They could not be mistaken in their knowledge of the fact, whether she was so rotten or decayed as they have represented, and if they speak the truth, she must have been extremely deficient and unseaworthy.

On the other hand, it is difficult to reconcile their evidence with the testimony of the plaintiff's witnesses. The depositions of Dorgan and the two ship-carpenters in the city of New York, prove, that the vessel at, and shortly before, the time she left that port, was apparently seaworthy, and in a condition which it seems impossible [*242] could admit of so great a decay in the period of seven months, at the expiration of which the voyage in question commenced. These, and other parts of the testimony, appear to me irreconcilable. If the question is to be decided on the *credit* of the witnesses merely, and there be nothing to impeach those on either side, the greatest number testify to the fact that the vessel was unseaworthy. These were witnesses residing at Honduras. That circumstance, and the want of a sufficient knowledge of their

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character and credibility, have been urged against allowing much weight to their testimony, when in competition with other proof. But if there be any general reason to discredit the witnesses abroad, other circumstances, in this instance, operate in their favor.

1st. As has been already observed, they possessed better means of information. They examined the ship immediately after the accident happened. The examination of the two ship-carpenters in New York, from its nature, must have been more superficial, and it took place seven months before the vessel sailed on the voyage insured.

2d. In the captain's protest no cause is stated adequate to the injuries described. A sound ship, under the circumstances therein set forth, could not, in all probability, have been so injured. It does not appear that any material accident happened; no external injury was suffered; not a spar nor a sail was carried away, although a considerable press of sail was sometimes used. I do not perceive that anything more is represented to have happened than what might be expected on such a voyage, and what a ship ought to be competent to encounter.

3d. The captain, in his protest, swears in general terms, without designating the particular injuries sustained, and refers to the survey at Honduras, which contradicts his testimony.

Neither he nor any of the crew were examined at the trial, and no reason has been given why they were not produced. I think it was to be expected from the plaintiff to produce them, and by their testimony it was in his power to throw farther light on the subject.

There is great reason to doubt the propriety of the verdict, and, considering the value in controversy, and that more light can probably be obtained, I think [*243] the cause ought to be reviewed. The circumstance that there was a struck jury, is not of decisive weight in favor of the verdict, especially as it is founded on a point

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against which, as a ground of defence, it is known considerable prejudice exists.

I am, therefore of opinion, that there ought to be a new trial on the question whether the ship was seaworthy.

KENT, J. The ship cleared out for Falmouth instead of New York. The clearance was for Falmouth and a market, although the ship was actually bound for New York. She was loaded with mahogany at Honduras, and cleared from *there* and in sixteen days after she sailed, she returned in distress.

I state no more of the testimony in the case, because the facts stated are sufficient for the only point which I heard argued in the cause, and on which I give my opinion, viz. whether there ought to have been a disclosure that the ship cleared for a different port than the one she was bound to?

In this case, the insurance was in time of war; but the case does not state that there was any warranty, or representation that the property was neutral, and we are to intend therefore, that there was none. The insurer, according to the decision in the case of *Murray v. United Insurance Company*, (July term, 1800,) took upon himself the risk of *enemy's property*. The non-disclosure of the clearance for Falmouth could not, then, in any possible view, be *material* for the disclosure of the fact (if at all material) could only have been so, as it affected the *neutrality* of the vessel.

On this point, therefore, I am for the plaintiff, and that the verdict ought to stand.

LEWIS, Ch. J. An application is made to set aside the verdict in this cause, and for a new trial. Three questions are raised for the consideration of the court:

1st. Did not the ship sail on a voyage different from that insured?

2d. Ought not the fact of her clearance for Falmouth and a market, pursuant to the orders of the plaintiff, of the 3d

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of October, 1799, to have been disclosed to the underwriter?

*3d. Is not the verdict against evidence on the [*244] point of the ship's competent sanity to perform the voyage insured?

The first question is raised on the fact of the Hope's having cleared from Honduras for Falmouth and a market, when the insurance was for New York.

This would be a circumstance of some weight were it connected with others tending to show that the real intention was a voyage immediately from Honduras to Falmouth, but cannot *per se*, be sufficient evidence of that fact, and certainly cannot be permitted to control the counter testimony, which establishes, beyond doubt, that her real destination was for New York, and that the clearance for Falmouth and a market was probably for the purpose of saving certain duties, in the event of the cargo ultimately finding a market at a British port. Her consignee at Honduras, from his correspondence with the plaintiff, understood New York to be her destination, and wrote letters by her to his correspondents here. The letter of the plaintiff to the captain, containing the instruction as to his clearance, directs him, in the same period, to return direct from Honduras to New York, as before ordered. The expressions are, "although you are to return direct from Honduras to this place, (viz. New York,) as before ordered, you will clear out the vessel from Honduras to Falmouth and a market." This, in my opinion, establishes beyond controversy, that New York was the port she was bound to. The first protest of the master, mate, and one of the seamen, in which the ship is stated to have been bound to Falmouth and a market is a circumstance almost too slight to be noticed; for I have observed it a practice, without variation, for the protest, in this respect, to be made according to the clearance, without regard to the true place of destination. In the second protest the master states, he sailed for New

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York, though cleared for Falmouth, thus correcting his statement, when he discovered the fact to be material.

If there is any substantial distinction between the cases of *Planche and another v. Fletcher*, *Mayne v. Walter*, (Doug. 238, Park, 195,) and the present case, it is favorable to the last. In the two first, the vessels cleared for an intermediate port, at which they had leave to touch, the [*245] policy continuing to their arrival at the ultimate port of destination; in this the policy would have terminated on her arrival at an intermediate port, though she might afterwards have proceeded under her original clearance for Falmouth.

The next question is, whether the fact of the clearance for Falmouth ought to have been disclosed to the underwriter. It is not contended that the concealment was fraudulent; and in order to render it a circumstance affecting the policy, it ought to appear material to the risk. The only guide we have on this occasion leads to a contrary result. There cannot be a surer test of the materiality of a concealed circumstance, than its influence, if known, on the rate of premium.

The New York Insurance Company were also on this risk, and, near two months after subscribing the policy, assented, without additional premium, that it should not be affected by the circumstance of the ship Hope having cleared out for Falmouth instead of New York.

This company must be presumed to understand its interests, and their conduct on this occasion is decisive; that the fact concealed was immaterial to the risk, and therefore the policy is not affected by it.(a)

(a) Where there is no warranty of neutrality, nor any character of the vessel, the insurer takes all risks, belligerent as well as neutral. *Elting and another v. Scott & Seaman* 2 Johns. Rep. 157. A disclosure, therefore, of the clearance, perfectly nugatory. If a policy be in general terms, "on goods on board the ship called the "Hermon," without any addition of country, and not represented as of any particular country at the time of signing the policy, it is not necessary that she be furnished with documents in conformity to

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The third and last question is on the seaworthiness of the ship. On the argument a novel position was advanced, viz. that latent defects are at the risk of the underwriter; that they are covered by the premium, because *he calculates chances according to losses*. My first impression, I confess, was favorable to its correctness, notwithstanding the force of authority against it. But on examination I was satisfied, that although in part true in point of fact, it is nevertheless unsound in principle. It is true that losses are the basis on which the underwriter calculates the chances of loss and gain. But it is equally true that his not being answerable for inherent defect, or natural decay, diminishes the number of losses, and thus reduces the chances against him. The implied warranty, then, on the part of the assured, that the ship is tight, staunch and strong, and well equipped, &c. remains unimpeached, and on the fact of this warranty having been complied with, on the present occasion, rests the question between the parties.

*The judge before whom the cause was tried, [*246] is, in the case made, stated to have instructed the jury "*that by law every vessel is presumed to be seaworthy.*" This I presume to be not perfectly correct, or, in other words, that the instruction ought to have been less general or rather, more precise. Every vessel is presumed to be seaworthy in the first instance, in respect to the implied warranty only; because the law will not, without cause, presume a party to have falsified his stipulation. But the instant she becomes innavigable, and incapable of proceeding on the voyage insured, the presumption is, that this proceeds from age or internal defect, arising from some other cause, until it appear to have been the effect of sea damage, or unforeseen accident insured against. And with reason is it so; for the insurer engages against *extraordinary and unforeseen perils of the sea*. And this he does, in the confidence that the ship is capable of performing the

treaties between a foreign state and her own nation. *Dawson v. Atty*, 1 East, 367.

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voyage, and assuring to him his premium, ordinary occurrences notwithstanding.

I am strongly inclined to believe that the verdict of the jury in this cause, was owing to the generality of this instruction. That relying too firmly on the presumption, as the reinstated, they sought for positive and conclusive evidence to the contrary, thereby losing sight of the presumption arising from the want of evidence of external accident, and not duly appreciating the testimony taken under the commission at Honduras, as to the real cause of condemnation.

The vessel is stated to have been nine or ten years old at the time of the insurance being made; to have been thoroughly repaired in 1795, examined in April, 1799, previous to the purchase of her by the plaintiff; afterwards repaired by the examiners, Williams and Peacock, two ship-carpenters, and purchased on their report. They state, that after her last repair, she was fit for a voyage to any part of the world. This testimony is corroborated by that of Captain Dorgan, who commanded her at the time she was purchased by the plaintiff. There is, however, a variance between his testimony and that of the two ship-carpenters. He

testifies that she was twice hove down within four-
[*247] teen months previous to the sale, some of *her planks ripped off, and her timbers examined, none of which were rotten or defective. Williams and Peacock, the ship-carpenters who repaired her, admit that some of her planks and timbers were tainted, which Williams says were mended, and Peacock, that they were replaced with new.

In opposition to this is the testimony of Nicholl and Tropp, ship-carpenters, and Potts, a master of a vessel, who examined her on her return to Honduras, who testify, that two thirds of her timbers were rotten, several of her planks and her bends rotten and started. This testimony is corroborated by that of Mr. Gibson, who is proved to be a merchant of respectability there, and treasurer of the settlement. He professes to know little of a ship, but de-

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clares that many of her planks were rotten, and several of her timbers so much so as to crumble to pieces when struck with a crow bar.

These witnesses may be said to be interested in her condemnation. The fact may be so. But surely such interest was not greater than that of Williams and Peacock, who probably, had they discovered or disclosed too many defects in her, would have deterred the plaintiff from purchasing, and thus lost the job of repairing her.

She does not appear to have met with any weather that could have effected a sound ship; yet, she made so much water that the master was obliged to return into port. And it is a little singular that if this was the effect of any other cause than natural decay, that it was not stated by the master or some one of the mariners. It is true, that in his second protest, he speaks of her having experienced *heavy gales and various changes of weather*, and yet not a spar is carried away, no butt started, no sheathing torn off. Surely a vessel *tight, staunch and strong* could not have been rendered innavigable by gales that did not require the striking of a top-gallant-mast; for we find the top-gallant-masts and yards standing until the third of February, a day after that on which, by the advice of his crew, he had borne away for a place of safety. He speaks of strong gales on the 28th of January, and yet the top-gallant-sails were not handed until midnight. Where is the evidence, then, of external injury? There is none. Nothing that looks towards this point, except his declaration, *that on the survey, the damage of the [*248] ship was found to have proceeded from the hard gales, in which they were obliged to carry an unusual pressure of sail, as (says he) is more particularly set forth in the survey: now the survey says directly the reverse, and corresponds precisely with the depositions of the witnesses on the part of the defendant.

I think the testimony will warrant no other conclusion than that she died a natural death. This opinion I found

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on the fact of no extraordinary peril having been incurred, and on the testimony taken at Honduras, which I think is to be preferred to that taken here; *those* searching for an infirmity, known to exist somewhere, were more likely to discover defects than *these*, who gave her a cursory examination for the purpose of recommending her to a purchaser, and of repairing such defects as occasionally fell under their observation.

The cases of *Lee v. Beach* and of the *Mills frigate*, were attended with circumstances much more favorable to the owners than the present case. In the former, the vessel had been, as was supposed, completely repaired immediately before sailing from the Thames, and was discovered to be unsound before she reached Portsmouth. In the other, the ship had not only been put into dock and repaired, previous to her departure on her outward bound voyage to the West Indies, but was, while there, again surveyed by six sea captains, and reported to want caulking only, when she would be sufficient to carry a cargo of sugars to London. Yet, in both these cases, were the underwriters discharged on the point of seaworthiness. 2 Marsh. 368; Park, 221.

I am of opinion, the verdict ought to be set aside, and a new trial awarded on payment of costs.(a)

LIVINGSTON, J. having been concerned in the cause, gave no opinion.

On the point of seaworthiness, new trial granted.

(a) The principle of this decision as to the effect of a clearance to a port different from that of destination, has been confirmed in the case of *Tulcot v. Marine Insurance Company*, 2 Johns. Rep. 130. It was there held not to make the voyage different from that insured, when done to avoid cruisers; and that the statement of the master in his protest, that the voyage was to the port for which he cleared, was equally inefficient, if the reason for so doing was explained. As to concealment, see *Ely v. Hallett*, 2 Gaines' Rep. 60. n.

Arjo v. Monteiro.—Jackson v. Stiles.

ARJO against MONTEIRO.

Practice on removing suits against aliens, into the circuit court of the United States.

By the Court. If an alien defendant file his petition, &c. to remove the suit into the circuit court of the United States, at the time of filing special bail, he is in season, though the bail may have been excepted to.(a)

***JACKSON, on the demise of HOGEBOM, against [249]
STILES; GRIFFIN, tenant in possession.**

After service of a declaration in ejectment on a tenant, though it may be a totally informal one, it is sufficient to set him on inquiry, and if a rule to show cause why the plaintiff should not amend be granted, affixing in the clerk's office is good service on the tenant. If proceedings be commenced for lands to which a title is awarded by the commissioners for settling disputes to lands in Onondaga, within three years after, it is sufficient, though they may be faulty, and require amendment after the three years, to entitle the plaintiff to proceed.

A TITLE to the premises in question had been awarded by the commissioners appointed to settle disputes to land, in the county of Onondaga, to the lessor of the plaintiff, who had served declarations on the tenants, with the usual notices annexed. The declarations, however, contained blanks for the towns and counties, which, at the time of service, were not filled up, nor were they, in the copies an-

(a) So in ejectment after a judgment by default against the casual ejector, if the landlord be an alien and then let in to defend. *Jackson, ex dem. Canine and others v. Stiles*, (George Clark, tenant,) 4 Johns. Rep. 493. If the application be in a suit between citizens of the United States, the affidavit must expressly state that one of the parties is a citizen of another state. *Orp v. Vermilye*, 3 Johns. Rep. 145. See *Redmond v. Russell*, 12 J. R. 153.

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nexed to the affidavits of service and filed with them, on which the usual rule was entered. The declarations were served on the tenants within the three years allowed by law for prosecuting the titles awarded, but they were now elapsed.

Spencer, on these facts, (disclosed by the affidavit of the plaintiff's lessor, which stated also the services having been made with the full intent of carrying into effect the actions instituted,) moved for a rule against the tenants to show cause, by the first day of next term, why the declaration should not be respectively amended by the insertion of the names of the towns and counties, and that fixing up the rule in the clerk's office should be deemed good service.

Emott. Are the tenants to take notice of declarations which are mere nullities, void in themselves, and to which they are not parties? They have not appeared, they are not in court, and John Stiles is the only defendant to the suit that can be known by the record.

Per Curiam. Notice having been served on the tenants, it was not enough to put them on inquiry. There is time enough for them to come in if they please.(a)

Motion granted.

COLE against STAFFORD.

The want of a stamp to an insolvent's discharge cannot be urged as a reason to show it not duly obtained and prevent the exoneration of his bail. Fraud only can affect it.

IN this cause the exoneration of bail, whose principal had been relieved under the insolvent law, was opposed on

(a) See ante 21, *Jackson v. Reynolds*. 154, n. (a) *Webb v. Wilkie*. Post, 251 *Jackson*, *ex dem. Finch v. Kough*.

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the ground of the discharge not having been duly stamped according to the act then in force.

**Per Curiam.* We cannot go into it; the act [*250] makes the discharge conclusive, except in cases of fraud; the matter was before the court below, and they were the proper judges whether every thing was regular or not.

ABEEL against **WOLCOTT**, who is impleaded with **VAN NORDEN**.

A writ of inquiry, in the possession of the plaintiff, not returned, and on which no inquisition has been taken, will not be set aside; as the plaintiff may sue out a new one.

VAN VECHTEN, on behalf of the plaintiff, moved that the writ of inquiry, and proceedings stated in the affidavit on which he applied, should be set aside, and a writ of inquiry issue *de novo*.

The affidavit set forth, that by an agreement in writing entered into between the attorneys of the parties, it was stipulated that on the execution of the writ of inquiry every defence which could have been made, had a trial taken place, should be availed of; that both sides should have the same liberty of excepting to the admissibility of evidence, reduce their objections to writing, and make a case in the same manner as if the cause had been heard at the circuit. That the evidence of each party having been gone through and closed, the attorney for the plaintiff went home, after which the jury called in Wolcott's attorney, and asked him if a verdict should go against Wolcott, whether he could recover his proportion against Van Norden? and whether, if it should be against the plaintiff, he could carry it before the supreme court? To the first of

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which questions, Wolcott's attorney answered no; and to the latter yes; in consequence of which a verdict was rendered for the defendant, but the writ had never been returned, and was handed to the plaintiff's attorney without any inquisition annexed.

Per Curiam. The application is to set aside a writ of inquiry, when there is none before the court. There is no return, no inquisition, and nothing to set aside. There was a written agreement, which does not appear to have been complied with. The plaintiff is in possession of his own writ of inquiry, and we see no objection to his issuing a new one; for as the writ is not before us, we cannot grant him the effect of his motion as to setting it aside.(a)

Motion denied.

[*251] *JACKSON, on the demise of FINCH and others,
against KOUGH.

After six years' service of declarations in ejectment, court will on terms give leave to amend by adding new demises.

DECLARATIONS had been served in these causes nearly six years ago.

Van Vechten moved to amend by inserting several demises from different lessors.

Metcalf opposed it on the ground that it might vary the tenant's defence.

Van Vechten observed, that in the Warren-Bush causes, the same thing had been done. If the defendant relin-

(a) See next p. *Van Der Mark v. Jackson*.

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quint: his defence, then all the costs heretofore incurred are to be paid; if he abide by it, then there is no injury done. The costs in the first case must be paid up to the day. This the plaintiff is willing to do, and accept any plea so that the case may be brought on at the next circuit.

Per Curiam Amend on those terms.(a)

Motion granted.

VAN DER MARK *against* JACKSON, on the demise of
OSTRANDER.

The defendant in error cannot *non pro* the plaintiff's writ before it is returned.

IN error. Judgment having been entered in the court of common pleas for the county of Ulster, on a verdict for the now defendants, the present plaintiff brought his writ of error returnable in this court. To this the clerk of the common pleas made his return in the manner said to have been usually practised in that county, by annexing a transcript of the record, and delivered it to the now plaintiff's attorney, who sent it back with directions to annex the original record. This was not done, but the writ redelivered to the plaintiff's attorney with only the transcript returned.

The defendant, without any service of a *scire facias quara executionem non*, and, without giving any rule to assign errors, *non pro*ssed the plaintiff's writ before it had been returned and filed, served him with a copy of a bill of costs, and sued out a writ of possession.

Gardiner, on affidavit of these facts, moved to set aside

(a) See *ante*, *Webb v. Wilkie* 154, n. (a.) *Anon.* 2 *Caines' Rep.* 261.

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the judgment of *non pros.* for irregularity, (a) and that if any writ of possession had been issued, a writ of re-restoration be awarded.

[*252] **Per Curiam.* As the writ was never returned, this court was never in possession of the cause. Whatever has been done here, must, therefore, be set aside. See *Leith v. Mac Ferlan*, 4 Burr. 1772.

Motion granted. (b)

 PHELPS against EDDY.

If a defendant moves for judgment of nonsuit contrary to good faith, the court will make him pay the costs of opposing.

WOODWORTH, on an affidavit stating that issue had been joined in this cause in November, 1801, and noticed for trial at the last circuit for the county of Columbia, but not brought on, moved for judgment as in case of nonsuit.

Williams read a counter deposition acknowledging the notice, but adding that the attorney for the defendant did not attend; that his counsel, however, was there, with whose consent an agreement was made between the agent for the defendant and the plaintiff's attorney, that the

(a) A writ of error may be *nonprossed* for want of alleging diminution; if there be no rule for diminution, the next step is a rule to assign errors, without giving of which a *non pros* cannot, in that stage, be signed.

(b) *Atk.* 260. *Abel v. Wolcott*. The court refused to quash a writ of error because the transcript was not returned and filed. *Account. y. Swift*, 1 Ld. Raym. 329. It would seem that before the return of a writ of error application to quash it must be made to the court from whence it issues, after the return to the court in which returnable. *Lloyd v. Skutt*, Doug. 350. In which case the writ must be entered on the roll, before the defendant can move to quash. *Kent v. —*, 6 Mod. 138. See also *Lewis Griswold*, 1 Wend. 292. *Morris v. De Witt*, 5 Id. 71. *Ferguson v. Jones*, 12 Id. 241.

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cause should not be brought on before the Friday in the second week of the circuit, on the Thursday next preceding which day the court adjourned; that it was impossible to bring on the trial during the circuit, because, in consequence of the agreement entered into, the plaintiff had sent his witnesses home, and they were not to return until the Friday appointed.

Per Curiam. Let the defendant take nothing by his motion, and pay the plaintiff his costs for opposing.

Motion denied, with costs.

RUSSEL, *against* BALL and others.

Service on an agent of an attorney plaintiff is good. Accidents do not excuse from costs.

THE court ruled in this cause, that service on the agent of an attorney plaintiff, is as good as in any other suit, and that it need not be personal.[1] Also that though unavoidable occurrences may prevent judgment as in case of nonsuit, yet they will not, separately considered, excuse from payment of costs; for the misfortune of the plaintiff ought to be borne by himself, and not work a prejudice to the defendant. See ante, 22.

JACKSON, on the demise of GREEN and others, *against*
BILLINGS.

Limits are allowable to persons in execution under an attachment & costs.

THE defendant was a prisoner with the privilege of the limits of the jail of New York. While so it was

[1] See New York Code of Procedure, s. 422, & seq.

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[*253] finement, *attachments were issued against him, in this and fifteen other suits, for contempts in not paying costs pursuant to an order of court. On their being lodged against him, the sheriff committed him to close custody, under an idea that an attachment for a contempt was in all cases a criminal process, and the defendant therefore, not entitled to the indulgence of the limits.

The case was now submitted to the court, whether the defendant was within the meaning of the privilege. The Court were unanimously of opinion that he was, on giving such security as the law requires.

HERRICK *against* MANLY.

overruled 2 Wm. 517

A plaintiff, who delivers to a constable a writ against the defendant in his own suit, on which the defendant is taken and imprisoned on the order and direction of the plaintiff, cannot in an action against him, by the defendant for false imprisonment, under the general issue, give the special matter in evidence by way of justification under the statute for "more easy pleading in certain suits, but he may do it in order to show that the defendant was not arrested by his instructions, but by virtue of a superior authority.

THIS was an action of trespass for false imprisonment. The defendant pleaded not guilty. The cause was tried on the twenty-fifth day of May, one thousand eight hundred and three, before Mr. Justice *Kent*, at the Rensselaer circuit. The plaintiff called Samuel Hawley, a constable, and proved by him, that he arrested and imprisoned the plaintiff by order of the defendant. The counsel for the defendant then asked the witness by whose authority he made such arrest and imprisonment? whether it was not by virtue of an execution issued by a justice of the peace, delivered to him as constable, against the now plaintiff, in favor of the now defendant? The judge overruled these questions, being of opinion, that it was sufficient for the

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plaintiff to prove that Hawley imprisoned him by order of the defendant; and that it was not competent for the defendant to explain by the same, or any other witness, either the cause of the arrest, or the authority by which it was made.

The defendant's counsel then stated, and offered to prove, that Manly recovered judgment against Herrick before a justice; that execution issued against him on that judgment, and was delivered by Manly to Hawley, the constable; that Manly requested Hawley to imprison Herrick on the writ thus delivered, which he did; and that Herrick was liable to be imprisoned on the execution.

These facts, it was contended, might properly be given in evidence under the general issue, inasmuch *as the defendant came within the statute for the more [*254] easy pleading in suits, &c. The judge overruled the testimony offered, and a verdict was found for the plaintiff for fifty dollars damages.

The case now came before the court on a motion for a new trial.

Woodworth, for the defendant. Two reasons may be urged why the present verdict should be set aside. First, the judge refused evidence proper in mitigation of damages. Second, he overruled *that* which was proper in justification. As to the last position, it may be doubted whether the defendant could justify according to the statute (21st March, 1801, c. 47. 1 Rev. Laws, 234,) "for more easy pleading in certain "suits," though he certainly must be allowed to be within the spirit of it. The words are, "If (Sec. 1,) any action upon the case, trespass, battery, or false imprisonment, be brought against any sheriff, &c. or any other person who in *their aid or assistance, or by commandment*, do any thing, &c., it shall be lawful for every person aforesaid to plead thereunto the general issue, and give the special matter in evidence." By a liberal construction of this act, it may well be said, that Manly acted "in aid, and

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by commandment," of the justice. An execution had issued; it was delivered over to the present defendant by the justice, to be by him transmitted to the constable. The orders of the defendant, for the arrest and imprisonment, were nothing more than a repetition of what the justice commanded him to say. On the other point, the evidence must be considered as clearly proper to have been received, and the rejection, therefore, not warranted. Whether Manly had a substantial defence to defeat the action or not, could be known only by disclosing facts, which would present a different case than that stated by the plaintiff. They ought, then, to have come before a jury, as a measure of damages. If asked whether the imprisonment was made under a lawful authority, or of his own will, the answer, according as it was given, would lead the jury to very different conclusion. Had it been done, the plaintiff in this case would not have been entitled to more than nominal damages. [*255] *Suppose the action assault and battery, and the defendant, neglecting to plead *son assault demesne*, rests on *non cul.* At the trial the plaintiff proves an assault, but the same witness can testify that the plaintiff struck first; can it not be shown in evidence on the part of the defendant? Though this might not justify, it would greatly mitigate.^(a) The question on the trial, on the part of the plaintiff, "Did you imprison the plaintiff by order of the defendant?" The question on his part was, "Were you authorized to do so?" The answer would have been "Yes! I have the execution to show;" but this was not permitted to be done. Whether this would have amounted to a justification or not, is immaterial; all that was wanted was, to show that the plaintiff was entitled to nominal damages only, and to reduce them to that. Again,

(a) The general rule is, that matter of justification must be pleaded. Bull. N. P. 17. Co. Litt. 282. b. But see *Bingham v. Garnault*, Esp. N. P. 317, where one of the plaintiff's witnesses was, on a cross-examination by a defendant in an action of assault and false imprisonment, allowed to relate what was said at the time in mitigation.

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suppose an officer acting under a void process, and the plaintiff proves an arrest, would not the court allow the defendant to show the process, though it was an illegal one? This, it is true, would not be a justification, but it would be a mitigation. Therefore, in cases like this, the application is to the discretion of the court, and they will see that justice be done to the party aggrieved, when there has been an action against all conscience. Instead of six cents damages, 50 dollars have been given. This is not one of those cases where the court refuse new trials, because the sum recovered is so inconsiderable that it would be absurd to have recourse to another. The reason does not apply here, because, allowing the verdict goes the same way, the court are not sure the result will be the same: six cents only may be given, and then costs will not follow, unless the judge certify. But, as the verdict may be different, the court surely will never presume both that the verdict shall be similar, and that the judge will certify also. There are many circumstances to induce a new trial; there has not been a full disclosure of facts; the whole truth has not been told, and, therefore, justice has not been done.

Allen, contra. On the point first argued, though the last that was made, it is to be observed, that the statute *of our state is a transcript of that of James; [*256] the authorities, therefore, on the construction of that, will govern in the consideration of the present case. The defendant, to avail himself of that statute, ought to show that he is an officer within its meaning; that he was acting by virtue of an authority from the justice, or in his aid, or by his command. If he does not do this, he cannot avail himself of the statute. *Money et al. v. Leach*, 3 Burr, 1742. Further, if the defendant is not shown to be liable, in consequence of neglect in complying with the justice's command, he is not an officer within the meaning of the law. Doug. 307.(a) It is not stated that he received the

(a) That was an application to enter a suggestion on the roll, that the de-
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execution from the hands of the justice; nor that he was an officer, nor acting in pursuance of any authority, nor in aid. It does not appear by what means the execution came into his hands. If he means to shelter himself under the justice of the peace, he must show a connection or privity between himself and the magistrate. This can only be done by pleading right. If justice has not been done, it is the party's own fault. His mispleading is the source of his complaint. When the constable was asked whether he did not proceed upon an execution, it was a justification; and as no notice had been given that it was intended to be relied on, the plaintiff was not prepared, and might have been prevented from doing away its force, by showing it amounted to nothing. Not, therefore, having done what the law requires in such a case, but relying on the general issue, the defendant is now precluded. It was enough for the plaintiff to prove that the defendant did imprison. This was all that could be thought necessary; the plaintiff rested his case at that point, and could never imagine it would be attempted to introduce a justification, of which no notice had ever been intimated. The complaint, therefore, now made, of injustice having been done, could never have existed, had the defendant adhered to the rules of practice. The testimony, therefore, was properly overruled, because, under the general issue, notice of justification ought to have been given. The witness having been the plaintiff's, does not alter the matter. If the defendant is about to [*257] draw out from *him testimony not admissible, it is the same thing as if endeavored to be given by a witness on the part of the defendant, (see note, *ante*, p. 255,) and the plaintiff has a right to object. The court will not open a case again, where the expense of going to a second trial will amount to as much as the damages given.

defendant was a constable, to entitle to double costs, the verdict having been found in his favor. By our law the jury who try the cause, assess the treble damages given. Sec. 2.

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LEWIS, Ch. J. delivered the opinion of the court. An application is now made for a *venire de novo*, on the ground of misdirection on the second point of defence.

The defendant having been the mere bearer of the writ (which was an execution in his own suit) from the justice to the constable, can neither be considered as a bailiff, or deputy, *within the letter or spirit of the [*258] statute, and, of course, not entitled, under the general issue, to give the special matter in evidence, by way of justification. The testimony, as it was offered, was, therefore, properly rejected. There is, however, a point of view, under which, had it been presented, it would have been proper, and ought to have been admitted. The only ground on which the liability of the defendant is contended for is, his having directed the officer, when he delivered him the process, to arrest and imprison the plaintiff. If, then, it could have been shown that the arrest and imprisonment was not a consequence of his instructions to the officer, but in pursuance of a competent and paramount authority, his plea would have been substantiated, and a verdict would have passed for him. For if the arrest and imprisonment was the effect of any other cause than the instructions he gave the officer, he was, emphatically, not guilty, and it was not a case for justification. We are, therefore, of opinion, the verdict be set aside; but it must be on payment of costs, as no misdirection appears. See *Schermerhorn v. Tripp*, 2 Caines' Rep. 108. n.[1]

New trial, on payment of costs.

[1] See also Code of Procedure, s. 149, et seq.

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 BAKER and ROWLSON *against* R. and H. ARNOLD.

An attorney in a suit may be examined as a witness to prove the state of an instrument when put into his hands. An endorser of a note is a good witness to prove the endorsement made after the note was due.

ASSUMPSIT on a promissory note, by the endorsee against the makers.

This cause was tried before Mr. Justice *Thompson*, at the Albany circuit, in September, 1802. The plaintiffs proved by the testimony of their attorney in the suit, the handwriting of the makers, and, by another witness, that of the endorser, who was also the original payee. Having done this, they there rested their case.

The defendants relied on the note's having been given on an illegal consideration, and endorsed after it was due.

To substantiate these points, they proposed to examine the attorney of the plaintiffs(a) to the following questions:

(a) The inadmissibility of attorneys and other practitioners of the law to testify to facts, the knowledge of which they have acquired from the confidence placed in them as professional characters, being the privilege of the client, (*Wilson v. Rastall*, 4 D. & E. 753,) whoever stands in that relation, is within the rule of exclusion. A counsel, therefore, who has moved in a cause, cannot be examined as to the subject of the motion; (*Curry v. Walter*, 1 Esp. Rep. 450,) nor an interpreter between client and attorney, as to the communications which passed through him. *Du Barre v. Livette*, Peake's Cas. 77. Whatever is disclosed, for the purpose of a suit is a communication made under the protection of professional confidence, though it be only by way of asking advice; (*Wilson v. Rastall*, *ubi sup.*) consequently, the relation of attorney and client may commence before a suit be instituted, (*Gainsford v. Grammar*, 2 Campb. 9.) and will subsist after it be terminated. Therefore, though the cause in which the communications were made be at an end, a person who stood in such a relation cannot speak to those facts in another suit, (*Du Barre v. Livette* *ubi sup.*; *Wright v. Mayer*, 6 Ves. jun. 280,) even when the client is not before the court; (*Rea v. Withers*, 2 Campb. 578;) as in the case of an action for an escape, brought against the sheriff, the attorney for the original defendant cannot be examined to prove the debt. *Slo-man v. Herne*, 2 Esp. Rep. 695. Whether the information acquired by the

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1. Whether he had ever seen the note before the suit was brought?

2. Whether, at the time of its commencement, the name of the endorser was upon it?

This was resisted by the counsel for the plaintiffs, because tending to a disclosure of facts confidentially communicated to the witness, as attorney in the [*259] cause. The defendants then said, that they would confine the question to the witness's own knowledge, and did not wish to extend it to any information derived from, or communicated by, the plaintiffs. The witness then said,

attorney or other, be by seeing or hearing, is immaterial; the law is the same. An attorney cannot testify to the destruction of an instrument of writing, where his knowledge is derived from his own eye-sight, if he was then acting as an attorney. *Robson v. Kemp*, 5 Esp. Rep. 52. In this case Lord Ellenborough held that he was bound to be silent "as to all which took place in the concoction and preparation of the deed, or at any other time not connected with the execution of it," he being an attesting witness. But Lord Kenyon ruled that an attorney who had prepared a bond and mortgage, might be examined to prove a usurious consideration, because he was, "as it were a party to the original transaction, which did not come to his knowledge in the character of an attorney." *Duffin v. Smith*. Peake's Cas. 109. What an attorney obtains his knowledge of, as to the times, names and dates of a bill of exchange put into his hands to proceed on, from the delivery of the bill by his client, according to Lord Ellenborough, are circumstances to which he cannot be interrogated. *Brand v. Ackerman*, 5 Esp. Rep. 176. When an attorney attests a deed, he lays aside his professional character, and can be examined in the same manner as any other witness, as to what passed at the execution of it, but no more. *Robson v. Kemp*, *ubi sup.* As the rule was framed for the security of the client, as to the instituting, prosecuting, or defending suits, and conducting their business, what is communicated after a suit is at an end is not privileged. *Cobden v. Kendrick*, 4 D. & E. 431. Therefore, a former attorney of a defendant may be called to prove an offer made through him to the plaintiff to settle an account, and pay a sum of money acknowledged by the defendant to be the plaintiff's due; (*Turner v. Railton*, 2 Esp. Rep. 474.) and, as the exclusion of his testimony is only as to that which comes from his client, he may be examined to prove the contents of a notice served on him by the opposite side. *Spencer v. Shellenburgh*, 7 East, 357.

See also *Goveney v. Timnahill*, 1 Hill, 63; *Brandt v. Klein*, 17 J. R. 335; *Jackson v. M'Vey*, 18 J. R. 336; *Jackson v. Burtis*, 14 J. R. 391; *Jackson v. Denison*, 4 Wend. 558.

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he ~~had no~~ knowledge of the note, previous to his being retained by the plaintiffs, nor of any facts or circumstances relating to the matter in question, excepting such as had been confidentially communicated to him by the plaintiffs: but that he had, prior to the bringing the present action, instituted a suit in the name of the endorser payee, against the defendants, which, on account of some unfair practices by them, had been discontinued, and the now pending action commenced shortly after. The defendants then called the endorser(a) to testify that the endorsement was made after the note fell due. The learned judge, however, rejected his evidence upon this ground, that no person whose name is on negotiable paper, and has given it a currency, shall be permitted to impeach it.

The counsel for the defendants then urged that they would waive all testimony that went to impeach the note in any respect, or the original contract between the parties, or to prove that payment had been made. That they would confine their question to this: "At what time did you endorse this note?" But his honor overruled the question as improper. The plaintiffs, then, to repel the suggestions of the defendants, and to prove that they had treated for its payment, read the following letter.

"Troy, March 4th, 1799.

"MR. SYLVESTER ROWLSON,

"Sir,—

"On my return home, I immediately informed my brother of the conversation that had passed between you, Mr. Baker and myself, on the subject of our business; since which, we have been round to all our friends, to see what assistance we could get from them, or what could be done in the business, and I am very sorry to inform you, that

(a) When an endorser, in an action by the endorsee against the maker, is called to testify for the defendant, may he not be supposed to be speaking against his own interest, and rendering himself liable on his endorsement? In *Carrington v. Milner*, Peake's Cas. an endorser in such a situation was held a good witness to prove the note paid.

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we find it a thing impossible to raise the money, as the *situation of several of our friends is, in [*260] some respects, like our own; and people in general here are so much embarrassed, that it is impossible to get them, who have got any money, to advance any upon land security, which is the only kind in our power to give them; and I know of no possible way in which we can pay it, unless you will consent to take part of it in the lands that I proposed to you. If you will consent to make a discount of 12 1-2 per cent. on the note, which is 330 $\frac{1}{2}$ this currency, and will take two lots of the land, which will be 500 acres, at a dollar, which it now stands us in, we will, by some means or other, turn Mr. Baker out the remainder part in money, say 200 dollars, and the rest in such property as he can realise. I wish you would show this to Mr. Baker, and if he and you will consent to it, I wish you would come on as soon as you possibly can. There will be no occasion for his coming, as you can do the business for him and yourself too.

(Signed)

"RICHARD ARNOLD."

The court then charged in favor of the plaintiffs, and the jury found accordingly. It was now moved to set aside the verdict, and grant a new trial, the judge having rejected testimony which ought to have been received.

Woodworth, for the defendants. I understand there has been a decision in this court corresponding with that in *Walton v. Shelly*, 1 D. & E. 296.

Court. There has.[1]

[1] The principle that a party to negotiable paper should not be admitted as a witness to impeach it, after having prevailed for some years, and been sustained by a number of decisions, was overruled. See *F. & M. Bank of Michigan v. Griffith*, 5 Hill, 476; *Stafford v. Rice*, 5 Cow. 23; *Bank of Utica v. Hillard*, 5 Cow. 153; *Williams v. Wallbridge*, 3 Wend. 415; *Traunott v. Davis*, 4 Barb. 495.

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Woodworth. I have, however, to move to set aside this verdict because the judge overruled the testimony of the plaintiffs' attorney, and because, though the authority of *Wallen v. Shelly* be admitted to its full extent, yet, as the endorser in the present case was not called to testify to what would invalidate the note, he was not, within the letter or spirit of the case, relied on. With respect to the first point, we are ready to concede, that attorneys and counsel are not to disclose those secrets which their clients communicate. But in this case he was not called on to testify to any such circumstance. Having seen the note, he was asked merely whether he had not seen it in a situation different from that in which it was produced? This [*261] question, therefore, *does not in the least contravene the general rule. He might have seen it before the suit was brought, without endorsement, and without any communication. If so, he ought to have been interrogated as to that fact. The boundaries of the line of practice in this respect, are accurately laid down in the books. Bull. N. P., 284; Esp. Dig. 717. "The rule is confined to cases only where the attorney is called to prove facts communicated to him by his client, *in the course of business, and instructing him professionally.*"

"A counsel or attorney may be called on to prove a fact of their own knowledge, of which they *might* have had a knowledge without being counsel or attorney."

"As if the question was concerning a rasure in a deed, they may be examined, *whether they ever saw such deed in a different plight*; for that is a fact of their own knowledge, but they may not be examined as to the expressions of their client." *Lord Say and Sele's Case*, decided 10th of Anne, by advice of all the judges.

"So if they are to be examined as to the true time of the execution of a deed." Bull. N. P. 284. These authorities go the whole length of the case before the court. No communication was desired of the witness as an attorney. "Had he ever seen the note without endorsement?" This he must

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have learned when it was put in his hand: he derived his information from that circumstance, and not from any communications made. This, therefore, is perfectly analogous to the rasure in the deed; because, the inspection of the paper furnishes the answer, and the communications of the client are not wanted. No confidence is violated; a simple fact, arising from the attorney's own personal observation, is all that is required. The object of the inquiry was to obtain the true time of the endorsement; an object in perfect harmony with the case put in Buller, of an examination as to the true time of executing a deed. The period of endorsement we endeavored to show both by the attorney and endorser. We alleged it to have been after the commencement of the suit; but the testimony of both our witnesses was rejected. If the question was proper, *we were shut out from our defence, and this, [*262] at once, is enough to warrant a new trial. On the second point it is material to inquire whether the court will extend the rule in *Walton v. Shelly*, so far as to preclude an endorser from speaking, where what he may say does not go to invalidate the instrument, and is, therefore, clearly distinct from the principle of that case. It is necessary, in order to determine whether the evidence was properly refused, to observe, that we entirely disclaimed every pretence of invalidating. All we did was to aver a fact which gave us a right to defeat this suit. So, that admitting the authority of *Walton v. Shelly*, it does not apply here. To show this, it may, perhaps, be necessary to investigate what is the point of the rule as then laid down: it seems to have been founded on public policy. By examining the defence in that case, and those of a similar description, it will appear that it went to destroy the contract, and therefore, the court said, a man who has sent a note abroad, shall never contradict the instrument he has contributed to render current, and thus vitiate it in the hands of an innocent holder. If the principle be sound, an endorser, if examined for this purpose, should be rejected. But here, no attempt was

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made to set aside the note ; no tendency towards affecting public policy is to be seen. The aim of the defendants was to impeach the practice of the attorney, and prove that issue was joined before the right of action accrued. The plaintiffs must know when their right commenced, and to evince *that*, does not touch the instrument or consideration. An endorser may testify to collateral facts, unconnected with the validity of the paper. He may prove payment ; for that does not destroy what he has made current. There, fore, policy is out of the question : if it be admitted to operate at all, it must in favor of the defendants. When the plaintiffs commenced their action, they knew they had not any right. The endorsement was afterwards made, to do away the equitable and legal claims the defendants had, to set off what might be due to them from him who had demands against them. To the note itself it is immaterial

when the endorsement was made, whether before [*263] or after *it was due ; but to the defendants it is material in the highest degree, for it either affords or takes away their only means of defence. Before the decision in *Walton v. Shelly*, any disinterested person, not infamous, nor incapable of being sworn, was a competent witness, leaving his credibility to the jury. It was not till then that the principle was narrowed. But as this case steers clear of impeaching the validity of the note, the endorser ought to have been received. The letter of the defendants does not impair their defence. If the plaintiffs had not a right of action when they commenced their suit, for want of an endorsement, the letter does not cure the defect, and work as an endorsement. It was written under an idea of the note being endorsed, and that the plaintiffs were legally entitled to sue. If it turn out to be otherwise, the misconception will not vary the rule of law, which ordains that all plaintiffs, to warrant their appeal to a court of justice, must have a lawful claim to what they demand.

Henry, contra. Two points are raised for discussion. The

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first relates to the competence of the plaintiffs' attorney to prove the state of the note at the time of the institution of the suit. The second to the competence of the endorser to establish that the note was endorsed after it was due. On the first point, the law has been correctly stated. Whatever facts have come to the attorney's knowledge by confidential communication, he cannot be obliged to disclose; but to facts derived *aliunde*, or from his own observation, he may be compelled to testify. The application of this rule is the only dispute. The attorney expressly declares he had no knowledge of the note before the commencement of the suit, and such only as was confidentially communicated by the plaintiffs. There can, therefore, be no doubt as to not admitting him to prove the time of the endorsement. The authority from Buller makes for the exclusion. There the rasure was made after the deed came into the attorney's hands, and, consequently, the information could not have been derived from his client, but from his own observation. Where an attorney witnesses a deed, he stands in the same relation to both parties, and is put there for the very *purpose of testifying. [*264] From the course of the transaction, it appears, the fact inquired into could have been known by the plaintiffs' attorney only from committing the note to him to bring the action; this, therefore, is a confidential communication. As to the second point, the principle on which the testimony of the endorser was refused, is exactly that of *Walton v. Shelly*, in 1 D. & E. and *Winton v. Saidler*, in this very court, July, 1802. Every argument from policy to be drawn from those cases is applicable to this. If the endorser is to show that the endorsement was made after the note was due, he may totally defeat the recovery. For it lets in all equities which might be urged against the original holder, and may, in effect, destroy the note, under the pretence of not impeaching it. If so, then the rule of policy is as strong in one case as the other. In addition to this, the defendants, by the letter of Richard Arnold, acknowledge

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the debt, and offer a mode of liquidation. The effect, therefore, is not only to recognize the debt, and the right of the plaintiffs, but to waive every objection as to consideration and time of endorsement. It is a plain avowal that the merits are with the plaintiffs, and surely the court will not grant a new trial to hazard that to which the defendants allow we are entitled.

Spencer, in reply. It would seem from the arguments of the opposite counsel, that our only view was to show that the right to sue accrued after the action brought; the object really is to prevent our being excluded from our equities, by an endorsement after the note was payable, and to let in proof that this was one of the Susquehannah notes, which have been set aside whenever presented. The court will perceive that there was a former suit in the name of the original payee; that, however, was discontinued, because a verdict could never have been obtained in it, the present action then commenced, and a subsequent endorsement made. That the knowledge of this was confidential, is a mere supposition of the attorney. He imagines, because the note was, before institution of the action, put [*265] into his hands without an endorsement, that, *therefore, its being afterwards endorsed, was a confidential communication. We deny that; and so, though we allow the cases of *Walton v. Shelly* and *Winton v. Saidler*, we contend against their applicability to this now before the court.

[*266] *THOMPSON, J. This application is made on the following grounds:

1. That the inquiry offered to be made of the plaintiffs' attorney, was improperly overruled by the court.
2. That the testimony of Roswell Lombard, the endorser, ought to have been admitted under the circumstances mentioned in the case.

With respect to the first point, I think the inquiry offered

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to be made of the plaintiffs' attorney, was manifestly improper, and to have permitted it, would have been a violation of that rule, which the policy of the law has adopted, that an attorney shall not be *permitted* to betray a secret with which he has been intrusted by his client. This is the privilege of the *client*, and not of the attorney. It is necessary to be strictly observed, in order to protect a party in the full disclosure of all the circumstances relative to his cause, without the hazard of having them divulged. This restriction, however, does not extend to facts that come to the attorney's knowledge before his retainer, or to information derived from any other source than from his client. The inquiry offered to be made from the attorney, was whether the note on which the suit was founded, was endorsed to the plaintiffs, when the suit was commenced, with the avowed object of falsifying the endorsement, and showing the note to be given for an illegal consideration. To judge if Mr. Bacon could answer this question, it becomes **material*, previously to know at what [*267] time, and from whom, he derived his information; if from his client, and after the commencement of the suit, or after he was retained to prosecute it, the inquiry, I think, would have been improper. Mr. Bacon, on examination, declared, that he knew nothing respecting the note *previous to his being retained* in the cause, and that all his information relative to it was derived from his client. The authorities cited from Buller and Espinasse, instead of contravening the rule above laid down, are in direct confirmation of it. The cases there put suppose the attorney a witness to a deed produced in the cause, in which case he may be examined as to the time of execution. So, if the question was about a rasure in a deed, or will, he might be asked whether he had ever seen such deed or will in any other plight. And the reason why such question might be asked is at the same time given, to wit, because they are facts of *his own knowledge*, not derived from his client, which manifestly shows the inquiry was relative to facts which came

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to his knowledge previous to his retainer, or in some other way than from his client. Was that the case in the present instance? Directly the reverse. The attorney expressly declared that all his knowledge respecting the business was derived from his client.

The next question for examination is, whether Roswell Lombard, the endorser of the note, was a competent witness to falsify his own endorsement, and prove that it was made after it fell due, and also after the commencement of the present action, with the avowed object of showing that it was made on an illegal consideration, and, of course, void *ab initio*. This point I think settled by the principles adopted by this court in the case of *Winton v. Seidler*, (July term, 1802.) In that case, according to my understanding of it, the court decided, that upon principles of public policy, a person whose name appeared upon a negotiable note, and who had contributed to give it currency and circulation, should not be admitted as a witness to invalidate it. In that case the witness was called to prove the note was made upon a usurious consideration, and of course void in the hands of an innocent endorser. In the present case, [*268] the object avowed was general, to show the note was illegal and void. It is not explicitly stated whether the illegality of the note was to be proved by the endorser, or by other testimony. If by the former, he would most clearly be incompetent within the decision in the case of *Winton v. Seidler*; and I cannot discover why the same principles of policy do not exist to exclude him from proving a collateral fact, for the express purpose of destroying the note. The note purports to have been endorsed before it fell due. The fact to be established by the endorser was, that it was transferred after it fell due, and, of course, open to impeachment. This was an indispensable pre-requisite; it was an entering wedge to effect its destruction. If this note was founded on an illegal consideration, the same malady would attend it, if it should pass through the hands of a dozen innocent endorsees, who had taken it

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in full confidence that it was what it purported to be ; and having been endorsed before it fell due, the consideration could not be impeached. For the protection, therefore, of innocent endorsees, I think a party to a note ought not to be permitted to give the lie to his own acts, and contribute to the destruction of a negotiable note which he has circulated as genuine in all its parts. To say that a party to a note shall be competent to open the door, and progress one step towards the destruction of his own paper, and there stop and become incompetent, will, I think, be productive of uncertainty and endless confusion, and will require refinements, and distinctions, too nice and subtle for general rules of evidence. If Roswell Lombard was the witness to prove the illegality of the note, he was an incompetent witness within the terms of the decision in *Winton v. Saidler*. If he was called to prove a collateral fact, indispensably necessary to be established, and thus aid and assist in validating his own paper, I think he was incompetent within the reason and spirit of that decision. It remains only to be examined, whether he ought not to have been admitted, after the defendants' counsel had waived all pretence of impeaching this note, or showing it had been paid, and confined themselves to the simple inquiry, whether the note was endorsed *after the commencement of the [*269] suit. I think, considering it merely as an abstract question, the witness was incompetent to answer it. But the defendants here had abandoned all defence on the merits, and the only object in view being to turn the plaintiffs round to a second action, every fair and reasonable presumption ought to be made in favor of the recovery. If the plaintiffs were in possession of this note, as their own property, and in their own right, when they commenced their suit, the simple act of endorsing, (a) and thereby complying with the forms of law afterwards, ought not to defeat their action. It is not presumable they could

(a) See this principle acknowledged, *Smith v. Pickering*, Peake's N. P. Cas. 50.

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commence a suit on this note before they had it. Independent of this, however, it appears from the case, that on the 4th of March, 1799, some time previous to that when the endorsement even purports to have been made, the defendants, by letter, recognized the plaintiffs' right to this note, made propositions for payment, and treated them in every respect as the real owners. Under these circumstances, I think the time when the endorsement was in fact made, whether before or after the commencement of the suit would have been immaterial. And it never can be sufficient grounds for granting a new trial, to ascertain an immaterial fact.

I am, therefore, of opinion, that the plaintiffs ought to have judgment upon the verdict of the jury.

LIVINGSTON, J. The defendants, on the trial of this cause, insisted that the note was endorsed after commencement of the suit, and to prove this fact produced the endorser, whose testimony was not received. Whether the endorser be a proper witness for this purpose, is unnecessary now to decide. There is great danger in permitting any one whose name appears on a note, which is the subject of controversy, to be a witness at all. The court will not receive him to impeach its validity; and when a fit occasion offers, it will merit serious consideration whether it will not be best to exclude him altogether. It is true, that a man who comes forward merely to prove *when* he put his name on a note, does not excite so much detestation, as one who [*270] basely obtrudes himself *to* destroy a security to which he has given currency, by affirming that it was given on an illegal, or without any, consideration. The rule of the civil law, therefore, which says, "*nemo allegans suam turpitudinem est audiendus*," is adopted both in England and in this state: so also in Pennsylvania, the endorser and original payee was not permitted to invalidate his own instrument, by establishing a want of consideration, although he was a certificated bankrupt, and not interested.

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2 Dall. 194. For my part, it would give me less offence to see such a man expiating his fraud and effrontery in a pilory, than attesting heaven, in the sanctuary of justice, to the truth of asseverations, which at once evince his turpitude, and destroy his credit. Even in the case before us, the payee was to prove a fact different from the import of his endorsement, which, when not dated, is supposed to be made on the same day with the note, and is generally so alleged in declarations. There was, then, some degree of turpitude in first putting his name on a note to enable the plaintiffs to recover, and then appearing at the trial to destroy a right of action created by himself. But without hazarding an opinion on this point, I think the fact offered to be proved, considering the use to be made of it, was irrelevant. It is conceded that the defendants did not wish to ascertain the precise time of the endorsement with a view to any substantial defence, of which the makers might have availed themselves against the payee, or against the endorser, if the negotiation took place after the note fell due. Their sole object was to show that the plaintiffs were premature in the commencement of their suit; because, at that time, there was no endorsement on the note. The effect of this would be to drive the plaintiffs to another action, in which it is admitted they must succeed. This being the avowed object, the testimony was properly rejected. It is not to be presumed that any man will institute an action on a note not in his possession, and in which he has no interest. Such an attempt can only be followed by certain defeat, and considerable expense. But a note may be delivered to the plaintiffs before a suit be commenced, *and the payee neglect to endorse it. [*271] Why should a court, in such case, prevent the plaintiff's title being perfected by a subsequent endorsement, and thus protect himself against the heavy inconvenience of discontinuing his suit, or suffering a nonsuit, on the payment of costs? A plaintiff is permitted to fill up a blank endorsement, or strike it out altogether in court,

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to facilitate a recovery ; but never is an injury made into the real time of making an endorsement, unless for the purpose of showing the consideration illegal, as between the original parties, or to pave the way for a defence which cannot be used against a holder who receives it *bona fide*, and before it falls due. If the defendants had not abandoned this ground, the proof would have been proper, and it would only remain to say whether it could be made by an endorser ; but, having expressly waived every defence arising from the lateness of the endorsement, the evidence, in my judgment, was inadmissible. The rule I adopt is this ; that a court will ever presume an endorsement to have been in season, and admit no evidence to the contrary, unless as introductory to a defence on the merits, but never for the single purpose of showing the suit was prematurely commenced. I had rather let the payee come in at the trial and put his name on the note for the furtherance of justice, than open a door to investigations of this kind.

But as the defendants did not relinquish the defence arising from an illegal consideration, until all their testimony to this point was rejected, it may be well to inquire whether the source from which it was offered to be drawn was proper.

Mr. Bacon, the plaintiff's attorney, was produced only to ascertain the time of the endorsement. Whether his relation to the parties exempted him from answering the questions proposed, is not absolutely necessary to decide ; because, in the view which I have taken of this subject, these questions were impertinent, unless the illegality of the contract could be established. I think, however, that the judge did right in imposing silence on him after his declaration,

“ that he had no knowledge of the note, previous
[*272] “ to his being retained, nor of any circumstance
relating to the matter in question, but such as had
been confidentially communicated by the plaintiffs.” The
right which clients have to the secrecy of their counsel,

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produces confidence and a full disclosure of every fact necessary to the latter's forming a just estimate of their several cases; courts, therefore, are careful that this trust shall not be abused, and will not permit even willing witnesses, when thus connected, to disclose matters frankly confided to them in moments of doubt and difficulty. Whether he *might* have derived his information from other sources is here an immaterial inquiry; because, it is proved to have come directly from his client. Mr. Bacon might have advised the plaintiffs that they had a right, being in possession of the note, to commence an action, although it was then not endorsed, and take their chance in getting the payee's endorsement afterwards. The fact, then, of its being unendorsed at the time of bringing the action if such were the case, was a secret intrusted confidentially to Mr. Bacon, and he ought not to be permitted, after giving such advice, and bringing the action, to defeat a recovery by his own testimony. I can hardly conceive a case in which the privilege of the client more powerfully interposes itself than in the one before us.

The only witness, then, by whom the contract could have been impeached, was the endorser; and he being a party to it, was properly rejected.

Upon the whole, my opinion is, that as no one was produced to invalidate the note, which at one time was the only defence set up, but the endorser, and as his testimony could not be received consistent with our decision in *Winton v. Saidler*, it became improper to show *when* the note was endorsed merely for the purpose of compelling the party to bring a new action. This principle is recognized by this court in the case of *Platt v. Platt*, in April term, 1795, Col. Cas. 36, and Hob. 199, cited in favor of it. "It is regularly true," says that authority. "that if the plaintiff will *himself* discover to the court any thing, whereby it may appear that he had no cause of action when he *commenced it, his trial shall abate; of his [*278] own showing it was against him." On this our

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court, without coming to a decided judgment, intimated that the defendant could not avail himself of any such matter by plea, unless the plaintiff himself discover he had no cause of action at its commencement. And if not by plea, *a fortiori*, he ought not to be allowed to give it in evidence. That I may be well understood, I think it proper to repeat, that from the whole of this case, which is not very accurately drawn, it appears that the defendant had no other witness to impeach the consideration of this note but the payee, and that as he was properly rejected, or could not be admitted for that purpose, the defendants, in pursuing the inquiry as to the real time of the endorsement, had no other object in view but to turn the plaintiffs round, by showing the action was prematurely commenced; for which single purpose I should have admitted no witnesses whatever to establish that fact. For these reasons, and as no injustice appears to be done, I am against a new trial.

RADCLIFF, J. The note on which this action is brought fell due on the 31st March, 1799, or at the end of the three days of grace thereafter. The endorsement is dated the 30th March, 1799.

It appears that on the 4th March, 1799, and previous thereto, there were negotiations between the plaintiffs (who afterwards became the endorsees) and the defendants, respecting the payment of the note; and also that a suit had been commenced before the present suit, in the name of Lombard, the payee, and discontinued on account of some unfair practice by the defendants, as was alleged by one of the witnesses. This evidence was not objected to, and these circumstances proved that the plaintiffs were privy to the original transaction, or acted as trustees for Lombard, the payee. On this ground alone, I am of opinion, enough was shown to entitle the defendants to go into evidence of the consideration of the note.

But the principal point I think is, that Lombard was a

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competent witness to prove the time the endorsement was *actually made. This would not im- [*274] peach the validity of the note, and, therefore, is not within the decision of *Walton v. Shelly*, nor of *Winton v. Sandler*, the latter of which was determined in this court. It was merely preliminary proof, which, if it appeared that the note had been endorsed when overdue, would have enabled the defendants to go into other evidence to impeach it. If no other evidence could be produced to that effect, the note would still be valid, and the plaintiffs would be entitled to recover. The idea of policy on this subject, appears to me to be carried beyond the reason of the rule.

I also think that the questions put to the plaintiff's attorney, whether he had before seen the note, and whether the name of Lombard was endorsed upon it at the time of commencing this suit, ought to have been answered. It would not have been a disclosure of the secrets of his client, within the sense of the rule which prohibits or excuses an attorney from making such disclosure. He was not asked to discover any thing communicated confidentially, but to answer a fact which he must have known from his own observation, and which, from its nature, could not be a secret intrusted to him. The endorsement or transfer of a note is a public act, and the discovery by an attorney whether it existed or not, ought, I think, not to be liable to this objection. The authority of Buller, which has been mentioned, is, in my view, to the same effect. I am, therefore, of opinion, there ought to be a new trial. Bull. N. P. p. 284, 288; Esp. Dig. 717.

KENT, J. The motion to set aside the verdict in this cause rests upon two grounds:

1. That the court overruled certain questions from being put to the plaintiffs' attorney as a witness.
2. That they rejected the endorser as an incompetent witness for the purpose for which he was called.

With respect to the second point, (for I shall pass by

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the first at present as unnecessary to be considered,) I do not think that the decisions of this court in the cases of *Winton v. Suidler*, and *Stewarts v. Currie*, (July term, 1802,) go so far as to warrant a rejection of the endorser in the present instance. In those cases, the maker of the [*275] note *in the one, and the endorser in the other, were offered to prove the note to have been *usurious*. Those witnesses were therefore, called to invalidate the paper they had signed. So, in the case of *Walton v. Shelly*, (1 D. & E.,) upon the authority of which I presume the above decisions of this court were founded; the endorser, who was rejected, was called to prove the note void by reason of *usury*.

In all those cases the testimony of the witness produced went *directly* to destroy the paper. Here the question went no further than to defeat the present action, by showing that it had been prematurely brought. Proof that a note was endorsed after it was due, might indeed *let in* the party to an examination of the consideration. But this consequence does not necessarily follow. The object of the party may be merely to set up as a defence payment to the original payee. And if it did necessarily follow, still it ought not to exclude the witness, because the testimony that *he gives* does not violate the sanction which his name had given to the paper. The sanction his name gives is, that the paper is valid, because the transaction is legal and honest, and he must say nothing that contradicts this. Whether the *date* of the endorsement be, or be not, correctly filled up, is a matter in which the endorser has no concern, nor to which he is considered as having added his assurance, because it is now the established usage for the endorser not to date his endorsement. It is generally *in blank*, and the holder fills up the endorsement afterwards, according to his convenience. The testimony of the endorser, as to the time of the endorsement, does not, therefore, as of course, or by any direct or necessary consequence, affect the validity of the note, or violate his *plight*

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ed faith to the world. And because it may *possibly* lead to other testimony that will impeach the note, is surely not enough to render the witness incompetent. It would be carrying the principle in *Walton v. Shelly*, and the decision of this court in pursuance of it, beyond all precedent, beyond every *dictum*, and would lead, as I apprehend, to manifest inconvenience in the administration of justice. *It has been the bent of the courts for a [*276] century past, to enlarge the rule respecting the competency of witnesses. It must be a present and vested, and not a future and contingent interest, that excludes a witness. He must be interested *directly* in the event of the cause, and not merely in the question put. These are instances in which the rule as to interest has been straightened, and defined with the utmost clearness and precision. And I could wish to see this other rule of witnesses being incompetent, on grounds of *policy*, rendered equally manageable, by being reduced to limits susceptible of equal definition and certainty. To do this, we must adhere strictly to the cases which produced the rule, and exclude only the witness who is called to impeach his own paper, by showing it to have been immoral or illegal when he put his name to it.

My opinion, therefore, is, that the witness offered was competent to answer the question put, and that there ought to be a new trial, with costs to abide the event.

LEWIS, Ch. J. concurred.

New trial granted.(a)

(a) See this case 3 Caines' Rep. 279.

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LAWRENCE, Jun. and WHITNEY *against* VAN HORNE and CLARKSON.

Under a general policy on goods, the assured need not disclose that his interest is only of an undivided part, but may recover according to his interest. If a vessel be captured and acquitted, the assurer is liable to the expenses incurred in prosecuting an appeal, interposed against the sentence condemning the assured in costs, and to obtain compensation for damages occasioned by plundering and embezzling, though the expenses surpass the amount of the underwriter's subscription.

A paper noticed to be produced and called for, is in evidence, and the party noticing has not a right to first inspect it. Whether the expenses incurred in an appeal are reasonable or not is matter for a jury.

THIS was an action on a policy of insurance, dated the 28th of April, 1797, on the cargo of the schooner *Nymph*, on a voyage to L'Anceveau, in St. Domingo. The declaration was for a total loss by capture, with an averment that the assured had labored for the recovery of the cargo, and expended 4,000 dollars, of which the defendants' proportion was 250 dollars, a sum equal to that of their subscription, which was for 250 dollars only.

The invoice of the cargo, including the premium of insurance, amounted to 12,061 dollars; the plaintiffs' interest a third; but this circumstance was not specified in the policy, which was general, without any disclosure of the rights of others in the subject insured; theirs not being intended to be protected by the instrument.

From the facts, as given in evidence on the trial, it appeared that the vessel sailed from New York the 1st of April, 1797, on the voyage insured; that she was [*277] captured by a Spanish privateer, and *carried into a port in the island of Cuba, where she and her cargo were libelled, but ordered to be restored. The court, however, sentenced the claimant in costs, to the amount of 1,500 dollars. The captain thinking this unjust, and finding not only the cargo one third plundered, but his vessel stripped of almost every thing, appealed from the decision

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to the court in the Havanna, which ordered the captain of the privateer to make good all deficiencies in the cargo, and that these should be ascertained by comparing the invoice with the amount of the sales which had taken place under an order of the court below, where they remained. Still, however, nothing was said of the costs, and the captain, after having appealed to Madrid, came away.

Of the capture, and various steps thus taken, he gave the earliest information to his owners, and the assured in the present policy, who immediately, on knowing of the vessel's being carried in, made their abandonment, which the defendants refused to accept. The plaintiffs, therefore, continued from time to time to direct the measures to be adopted by the captain, and paid one third of the bills he drew. The circumstances and situation of the vessel in Cuba, were proved to have been known and conversed on in one room used by some of the underwriters on the present policy, but not by the defendants, though it was also in evidence, that the conversations in one room are, for the sake of general information, carried and communicated in the other. The defendants gave notice to the plaintiffs to produce a letter on the trial, which, when it came on, they refused to do, unless the defendants would engage to read it in evidence. This they declined acceding to, without being first permitted to inspect it, and on its being denied, the judge before whom the cause was heard, ruled that the inspection could not be demanded, except on the terms which the plaintiffs wished to impose.

After this the trial went on, and the jury, in conformity to the opinion of the court, found for the plaintiffs, making, however, a very considerable deduction from the amount of the charges claimed.

*To set aside this verdict, and grant a new trial, [*278] a motion now was made.

Pendleton, for the defendants. The question, whether the underwriters are liable for expenses incurred in the

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prosecution of a suit for damages, after restitution, and a decree of acquittal when the captain appeals for damages, but does not say on what account. His own affidavit mentions, "that after several trials, it was finally decreed, on the 8th of March, 1799, that the vessel and proceeds of the cargo, should be restored to this deponent, and that any deficiency in the cargo should be made good by the captain of the privateer, to be ascertained by comparing the invoice with the account of sales of said goods, but no damages or costs were decreed." It is no part of an underwriter's contract to be answerable for damages on an appeal. The policy gives the assured a right to use exertions for saving the property, but after a decree to restore, the underwritten proceeds at his own risk. However, should it be otherwise, and the assurer be responsible, here the assured has not conducted himself so as to be entitled to demand any compensation from the underwriter. From August, 1798 to January, 1800, there is no application to pay any thing yet, for that time, the assured were informed of all circumstances, and bills were continually drawn upon him during the whole period. The assured ought not to have paid bills, given directions, and thus interfered, without the approbation of the assurers; because, if they are to be charged, he was making them liable *out* of the policy, and for what they did not engage. It is very loosely stated that the underwriters knew of the proceedings going on; mere possible hearing of conversations and facts. But it is not any notice, unless informed of particulars, of and for what the proceedings were going on. It is assigned as a reason for abandoning, that the underwriters had assumed to pay all expenses; here they were not put in a situation to make that election. There is also a point of law in this case arising from the manner in which the insurance is made. It is a joint adventure, by three persons interested. The action is by one of the parties, and the declaration is, [*279] "that he is one third interested in the policy. When the insurance is on a cargo, it may be ques-

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tioned whether he can make such an insurance, unless the policy be one equal undivided third part of the cargo. One witness says he was not insured; but under this policy there is nothing to hinder him from claiming a part.^(a) The averment ought to have been special; and so ought the policy, if any one person meant to insure a separate interest. It is conceived also, that the judge has mistaken the point of law with respect to the calling for papers. He ruled that when a paper is called for, the party cannot examine it to see if it is evidence, before he uses it in the cause. But he is no more obliged to use it than he is an answer in chancery. Here the plaintiffs would not produce the letter, unless the defendants would agree to read it as evidence. This they declined, unless they were permitted first to read it; and the court determined that the defendants had no right to a previous inspection.

Riggs, Hoffman and Troup, for the plaintiffs. We shall reverse the order in which the points have been brought forward by the defendants' counsel. We shall first speak to that which has been last insisted on; the misdirection of the judge relating to the paper called for. On this subject there is no case in the books, except the one in *Espinasse*, (*Sawyer v. Kitchen*, 1 Esp. Rep. 209,) and that does not apply. The point comes to this, that a party is entitled to look at every paper in the plaintiffs' possession. When an application is made for papers in the possession of another, the notice to produce them is on account of a previous knowledge of their existence and contents. It is done, therefore, on this principle, that there is a conviction they contain evidence useful to those who give the notice. If the adverse party does not produce it, the other side may offer testimony of its contents should the party noticed, be ready to give the paper in evidence, it does away the necessity of parcel evidence of its contents, to entitle to which,

(a) The underwriter never can be called upon to pay more than he has received a premium for.

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is the only reason why the notice is given. When the paper is called for, it is at the peril of the party who does so, and when so called for, if produced at all, even to [*280] the adverse party, *he ought to be compelled to read it in evidence. The attempt of the defendants, and the objection raised upon it are mere speculations, and, therefore, not to be favored. To adopt the doctrine contended for by the plaintiffs can induce no injury, but *that* of the defendants can produce no good. It affords an opportunity of inspecting, without any determinate view; if the paper is favorable, it is read; if unfavorable, rejected, and thus every scrap of writing in the possession of another is to be ransucked for the benefit of his adversary, without his even knowing whether it is to do him good or not. In the second place, as to the question made of the right to maintain an action for a third part. Every man who is an owner of an undivided part, may insure his part, and bring an action on it: for a joint connection will not prevent the insurance of what one has. The insurance need not express it to be an undivided part. The contract is so drawn for this very purpose; it is general, "As well in his own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in *part*, or in whole, does make insurance, and cause himself and *them* and *every of them*," &c. The engagement is to be applied as the interest of parties present themselves, for their several interests are covered by one policy. This construction does not militate against the principle that he who thus insures shall, at the trial, recover according to his interest; on the contrary, that very rule is founded on the principle. With respect to the first point raised by the defendants' counsel, whether the insurers were liable for expenses in a suit on an appeal for damages, after a restitution and decree of acquittal, perhaps, if the word was taken in the full and large sense of acquittal, and the appeal had been for imprisonment, or personal damages, the insurers would not have been bound.

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Yet, when the party prosecutes and partially obtains recompense, he then may appeal for damages, in the same manner as for restitution, if the whole had been condemned. The property was not so acquitted, as to permit the captain to proceed with his cargo, in the same manner *as if it had been restored, though charged. [*281] Even then he might have appealed for his charges; but it was not so restored; it was plundered of one third, and two thirds only of the whole were restored. On this account, and for this the appeal was instituted. If it was the master's duty to litigate, it was his duty to appeal, in order to get the whole property. If a contrary course had been pursued, and the two thirds had been received without an appeal, the defendants would have called on him for the third he had neglected, as they would have insisted that the clause is obligatory. The vessel was stripped of her sails, and, therefore, she could not have gone on with her cargo, though the captain had been willing to relinquish the one third plundered. If this be a restoration to make invalid his endeavors to get the third plundered, it would be very difficult to say what a restoration meant. The charge stated in the case, takes away the necessity of any further argument. The point for the jury was, were the circumstances such as to justify the appeal? Whether done with or without the knowledge of the assurer, was a matter given in evidence, and, therefore, left to the jury. But let it be remembered the abandonment was not accepted, and therefore the assured were obliged to adopt such conduct as would establish the right of the assurers, or themselves. The defendants ought to have taken the abandonment, to entitle themselves to find fault with the appealing of the plaintiffs. If the captain's conduct has been prudent and discreet, every part of it renders the insurer liable.

It is a general principle that the *bona fide* conduct of the captain charges the underwriter. From the circumstances in evidence, and set forth in the case, it is probable the de-

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defendants had notice, and on that probability the jury are to determine. The non-objecting of the defendants, when they knew what was going on, was an acquiescence on their part. The *quantum* of the claim was also taken into consideration by the jury, and they struck off a part, amounting to several thousand dollars. Suppose the whole had been destroyed, would not the captain have [*282] been justified in instituting a suit for damages, and there the suit could not have been for restitution, but *in terminis* for damages. As to the formal objection made by the defendants, that the action was not maintainable, the insurance being general, and the suit for only one third. Whatever weight might be in the objection, itself, though that it possessed any is not very evident, it, at all events, comes too late. The present is an application for a new trial, and, therefore, the objection not to be attended to now. Does the judge below decide on rules of practice? This objection does not touch the merits, but is merely a question of practice: the defendant, therefore, to avail himself of it, should show that he has suffered an injury by it.

Hamilton, in reply. It is of importance that the latitude taken by the assured in charging underwriters, through the general agency given by the clause under which the present hopes are founded, should be in some degree confined. The plaintiffs never asked whether they should proceed or not, but continued for two years defending without any personal authority. The increase of expenses was more than the whole value insured. However principles might warrant such a case, it ought not to conclude them. The question was, whether the parties had proceeded without authority. With regard to the interest insured, it deserved the interpretation of the court. Policies no doubt have a certain degree of latitude; they may cover various interests; such as are equitable, and even those which are undisclosed. This was an agreement for an insurance of a part, and it

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must be allowed; but then it ought not to cover the whole, when there is a joint interest. When it does so, the whole must be intended to be secured by a party insuring generally, and not that it is for his separate interest. What that interest is, he should specify; the contrary leads to fraud; because, if the vessel arrive safe, a return of premium might be demanded. Several policies might be effected by the several proprietors, each for the whole, and unless discovered, the subject of insurance might be paid for ten times over. But nothing can justify the plaintiffs' pursuing *the conduct they adopted at [*283], the defendants' expense. Whether the power to charge the underwriter at all, under the clause of the policy now insisted on, did not terminate the instant he had notice of the disaster, is, perhaps, the true point in question. The authority was immediately on notice, perfectly at an end. The right to charge the assurer, previous to notice, would exist without any clause; there would, and must be, an implied agency. The supercargo, or captain, would, from his situation, be constituted the agent of the parties concerned. The interests of all give him a right, according to foreign authors, to act from necessity. The clause was merely to affirm *that* principle inherent in the nature of the circumstances, and flowing from them; to remove a doubt which hung over the case of abandonment, whether the acts of the agents of the assured should not be construed a waiver of the abandonment that had been made. This implied agency could not, in strictness, continue after the abandonment. If an election to abandon be made, the right to act for the underwriter will be destroyed; if it be not made, the assured, as owner, must act for himself. After abandonment, reason appoints the assurer to act over his own property and interest. If a *part* be uncovered, then the assured may pursue for that, but not so as to charge the underwriter. It was not intended to say that the acts of the master, if left to himself, would not bind the underwriter. For he would continue or become the agent of

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him, in whom, after abandonment, the property vested. The orders given by the assured in this case, are like those in cases of two routes in the *iter*: a direction to pursue one, by destroying the captain's right of discretion, creates a deviation. No argument can be raised against the defendants, from the circumstance of their not objecting to the intermeddling of the plaintiffs; there was a joint interest, and, therefore, the unassured might act for the preservation of their own; and, in such a case, could the silence of the underwriter be construed into an acquiescence? for a mere silence of this sort could never create an authority [*284] to charge. With respect to the decision *of the judge at *nisi prius* on the point of evidence, he relied on the case from 1 Espinasse, 209.

RADCLIFF, J. Several questions have been made, which may be considered in the following order:

1. Whether the insurance, which was general, can apply exclusively to the interest of the plaintiffs, *that* being an undivided third part of the cargo?(a)
2. Whether the defendants are at all liable for the expenses which accrued subsequent to the acquittal, and in prosecuting the appeal for damages?
3. Whether the defendants were not entitled to inspect the letter called for by them, and to elect whether it should be read in evidence?
4. Whether the expenses in prosecuting the appeal at Cuba were reasonable, and ought to be allowed?

As to the first, I consider it well established in practice, that the assured is not required to state the particular interest, or proportion of interest, which he intends to have insured. It is sufficient if he have an insurable interest to the amount in question. Whether it be a distinct, or an undivided share, cannot be material. It may often be difficult to ascertain his interest with certainty. The owners were at least equitably entitled to their shares in *severalty*;

(a) See *Lawrence v. Sebor*, 2 Caines' Rep. 208, n.

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the interest of each, I, therefore, think, ought to be permitted to be severally enforced. In the present case it appears that the insurance was in fact so intended, and a witness, who was one of the partners, testified that the plaintiffs had no authority to insure except on their own account. The danger of fraud from this practice, I think is remote, and less to be apprehended than the inconveniences which may arise from a contrary rule.

2. As to the second objection, I see no reason why the defendants should not be liable for the expenses attending the prosecution of the appeal in Cuba, which was conducted with good faith and for their benefit. I am informed that it was decided by this court in April, 1795, in the case of *Smith v. Scott*, that an assurer is liable for similar expenses, beyond the amount of his *subscription, [*285] and I believe that the underwriters have in practice, uniformly acknowledged their liability.(a) The appeal in the present case, I think, was justifiable. The captain was condemned in costs amounting to about 1,500 dollars, one-third of his cargo was plundered, and the vessel stripped of everything necessary to her equipment. The restoration of the vessel and cargo in that condition, was a little better than a total loss. There is no direct evidence that the defendants afterwards had notice of the proceedings, but I think it may be fairly presumed. The capture was well known to them; an abandonment was made, and the proceedings were frequently a subject of conversation between other underwriters on the same policy. The defendants did business in the same coffee-house with those underwriters, and though in a different room, it is proved that it is usual for underwriters on the same risk to communicate to each

(a) *Watson v. Marine Insurance Company*, 7 Johns. Rep. 62, S. P. And in the expenses of labor, &c., may be included those of wharfage and selling the ship. *McBride v. Marine Insurance Company*, 7 Johns. Rep. 431. But under this clause by which these expenses are recoverable, the assured, or their agents, are not bound to appeal. *Gardner v. Columbian Insurance Company*, 7 Johns. Rep. 514.

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other the information they receive. From these circumstances, I think actual notice to the defendants may be presumed; if, then, they had notice, and did not signify their dissent, they ought clearly to be held liable to the result.

3. As to the third point, I see no reason to change the opinion I entertained at the trial. A party who gives notice to produce a paper in evidence, must be supposed to know its contents. If he does not, he ought not to be permitted to speculate through the forms of law, and obtain from his adversary the inspection of any paper or document he may choose to demand. Such a privilege would be liable to abuse, and, I think, neither correct in principle, nor consistent with the form of proceeding in such cases. The notice to produce a paper, requires it to be produced in evidence, and when once called for and produced, it is of course in evidence, and I think it cannot be called for on any other terms. I understand this to have been the practice of our own courts, and no question has arisen upon it to my knowledge, until a late decision of Lord *Kenyon* at *nisi prius*, which suggested the idea now maintained by the defendants' counsel. *Sayer v. Küchen*, 1 Esp. Cases, p. 210. It may be questioned whether the point decided in that case, is similar to the present. Without examining [*286] this, it was an opinion at *nisi prius*, and of itself no authority; and in addition to what has been said, I think the alternative that the party giving the notice, if the paper be not produced, may go into evidence of its contents, shows not only that he must be supposed to be apprised of them, but that he cannot have it in his power to compel a previous inspection. If the paper be refused or withheld, he can do no more than give inferior evidence respecting it. Neither the court nor the party can enforce its production for the purpose of inspection, or any other purpose.

4. Whether the expenditures in prosecuting the appeal in the island of Cuba, were reasonable and proper, under

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the circumstances of the captors' situation there, was distinctly submitted to the jury, and if extravagant or improper, they were directed to make such deductions as in their opinion should appear reasonable. They have, in fact, made a considerable deduction, and I cannot say that they have not done right, or ought to have deducted more.

I am, therefore, of opinion, on all the points, that the plaintiffs are entitled to recover according to the verdict as it stands.

THOMPSON, J. I concur in the opinion given, except as to the third point. I am inclined to think the defendants were entitled to an inspection of the letter they had given notice to produce, without stipulating that they would afterwards read it in evidence. The practice of giving notice to produce papers, as in the present case, has been introduced to save the expense of going into chancery for a discovery, and I can see no good reason why the party ought not to be entitled to all the advantages he would have, had he resorted to his bill in equity. In that case, after a discovery, he might exercise his discretion whether to use it as evidence or not. I do not think this right of inspection would be liable to the abuses suggested by the plaintiffs' counsel, that it might lead to an impertinent inspection of papers having no relevancy to the controversy. The party calling for the paper, must appear in the first instance, to have an interest in, and right to, it; he must give notice to produce it. This notice must contain a description of the paper with convenient [*287] certainty, and it must be proved to be in the possession of the opposite party; after which it would be competent for the party having the paper, to object against the introduction, or the proof of its contents, as being illegal or irrelevant, in the same manner as if the party calling for the paper had been in possession of it, or as might be done with respect to every other piece of testimony. To require a stipulation, at all events, that the paper should be read in

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evidence, might, in many cases, compel a party to introduce testimony against himself. This would be unreasonable, and I think liable to much greater abuse than permitting a previous inspection. So far as the decision of Lord *Kenyon* ought to have influence on determining this question, we have it in the case of *Sayer v. Kitchen*, at *nisi prius*. 1 Esp. Cases, 209. The defendant had given notice to the plaintiff to produce his books, and after having inspected them, declined using them as evidence. The plaintiffs' counsel then insisted, that the defendant having called for the books, they were in evidence before the jury. But Lord *Kenyon* said, it did not make them evidence; that if the counsel on one side called for the other's books, and made no use of them, that it was only matter of observation to the counsel on the other side, that the entries there were in favor of his client, but did not entitle him to use them in evidence. Although this decision is in no way binding on this court, yet I think the rule there laid down, is founded in good sense, and best calculated to answer the ends of justice, and, therefore, proper to be adopted. Had the plaintiffs in the present case, entirely refused to produce the letter, there can be no doubt the court could not compel a *specific* compliance with the notice, but could only have permitted the defendants to go into proof of its contents. The plaintiffs, however, admitted they had the letter, and made no objections against delivering it to the defendants, provided they would stipulate at all events to read it in evidence, which they refused to do before they had inspected it, and the court decided that the defendants were not entitled to inspect the letter, unless they

[*288] would afterwards read it in evidence. I think the judge ought to have said to the plaintiffs, if you have a letter, and intend to produce it, the defendants have a right to inspect it, and thus make their election whether to read it in evidence or not.(a) If you refuse to

(a) Decided according to this. *Kenny v. Van Horne & Clarkson*, 1 Johns. Rep. 395.

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produce it, the defendants will have a right to go into proof of its contents.

LEWIS, Ch. J. concurred, and on the third point said, he did not consider there was any essential difference between the opinion of THOMPSON, J. and that delivered by Mr Justice RADCLIFF.

KENT and LIVINGSTON, Justices, gave no opinion, the former not having heard the argument, and the latter having been of counsel in the cause.

New trial denied.

COULON *against* BOWNE.

A representation that a man has been a naturalized citizen since a particular year, does not mean that he was so in that year.

THIS was an action on a policy of insurance, in which a motion was now made for a new trial, and the only questions were on the materiality and construction of the following representation: "Mr. Coulon is a naturalized citizen of the United States "since the year 1794."

Hamilton, for the plaintiff. The question turns merely on a matter of representation: there is not any warranty, and the distinction between a representation and a warranty is familiar to every one. As no warranty was made, it affords a presumption that a belligerent risk must have been contemplated by all parties, and that the contract should not stand on the basis of neutrality; otherwise, a warranty would have been inserted. Therefore, though the representation be not precisely clear, nor totally exempt from doubt, no objection can be made on the score of a want of neutrality: for, as a representation is collate-

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ral to the contract, all ambiguities should receive a favorable construction. Let us now see if grammatical construction will not warrant the construction for which we contend. *Since* is contrasted to *then*, and plainly signifies he was not a citizen in 1794. If he had meant that he was a citizen in 1794, he would have said "*ever since*." This interpretation accords with the residue of the sentence. [*289] Transpose the words and put them in their natural order. "He is a "citizen of the United States *since* 1794." Otherwise he must have said, "*has been*," or "*ever since*." This is natural. Let it be remembered he is a Frenchman, and translates his own language into bad English. Had he said, "*depuis mille sept cent quatre vingt quatorze*," the sense would have been clearly exclusive of 1794. At least, this ambiguity would set the underwriter upon inquiring whether the emigration was before '94, or '98, to render it material.

LEWIS, Ch. J. In *Duguet v. Rhineland*,^(a) it was decided, in the court of errors, that though the emigration be *flagrante bello*, and the naturalization afterwards, it is sufficient to answer the warranty of neutrality in a policy of assurance.

Hamilton. May I consider that case as the settled doctrine of this court?

LEWIS, C. J. Certainly. This bench did think otherwise, but their judgment was overruled in the court above and they are bound by that decision.

Hamilton. As that case goes the whole length of this, it is unnecessary for me to argue any further in support of what is already decided, for *omne majus in se continet minus*.

(a) See the principles of this decision, 1 Calnes' Cases in Error, xxv. And the report of the judgment below lately published in 1 Johns Cas. 360.

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Pendleton, for the defendant. The case may be divided into two points. The naturalization of the plaintiff, and the materiality of the representation. On the first point, the question is, what ought to be understood by the representation: if the opinion is according to the usual meaning of the terms, then the naturalization was in 1794, or existing ever since 1794. There is no evidence that it was immaterial: it was material, and if true, that he ought to be considered as a neutral by belligerent parties. Besides, it does not lie with him to say it was immaterial, because it was a wilful misrepresentation. The principle of construction of terms used in contracts, and more so in representations, as being the foundations of contracts, is by taking them in the usual acceptance of the words; the ordinary, and not the grammatical. The representation must be taken as an answer; for the underwriter must be supposed to have asked, "When were you naturalized?" the [*290] answer is, since, or ever since, 1794. It must have been an answer, or why select one period more than another. He must have meant that he was naturalized in 1794, as according to the law of congress then in force, to entitle him to that privilege, his emigration would have been before the commencement of hostilities; and this being so, he would, according to the law of nations, have been protected in his commerce from a neutral country. Great Britain allows the privileges of neutrality to her own subjects, trading with an enemy from a neutral country, if they resided there before hostilities commenced. The representation was to make the underwriters believe it was a neutral risk, mislead them, and affect the rate of premium to be paid. That representations ought to be true and exact, *Park*, 174, 175. If false, and to lessen the premium, it was fraudulent, and being within his own knowledge, it is the same whether the fact be material or immaterial. But the circumstance is very material, as will appear from *Park*, 180, 182. *Hodgson v. Richardson*, 1 Black. 463. *Fillis v. Bruton*, Sit. Guildhall, aft. Hil. 1782. If, therefore, the dis-

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closure was not true, the court will not speculate on the materiality.

KENT, J. When did congress pass the first act prescribing terms as to naturalization.

Pendleton. In 1794. The person must have resided two years,^(a) and this would carry the emigration back to a period before hostilities. The period of emigration is, therefore, important, as it would determine the national character. The representation was in English, and, therefore, without examining the French translation that has been given, it was a false representation. Notwithstanding it has been decided that a warranty of neutrality is complied with by a naturalization, after emigrating *flagrante bello*, it is very different from a case where there is no warranty, and the emigration must, from the representation, [*291] have *been understood to be before hostilities, and therefore, no naturalization required by the law of nations, the property being protected without it.

Hamilton, in reply. The case of *Duguet v. Rhinelanders* is decisive. To adopt the reasoning of the counsel opposed to me, the court must say that an ambiguous representation, by which neutrality and emigration before hostilities may be inferred, is stronger than an express warranty of neutrality, when the emigration and naturalization are *flagrante bello*, and not disclosed.

LEWIS, Ch. J. delivered the opinion of the court. The only question arising in this case is on the representation; which, admitting it to be false, cannot avoid the policy, unless it be on a point material to the risk. The decision in

(a) The first act prescribing two years' residence, passed 26th March, 1790. Then came the law of 29th June, 1795, ordering five years. This was followed by the act of 18th June, 1798, requiring fourteen years, and, lastly that now in force, ordaining a period of five years.

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the case of *Duguet v. Rhineland* is not necessary to be here applied. The only view in which this representation could be material, independent of that decision, is as it respects the naturalization or emigration of the plaintiff, *flagrante bello*. Now, whether he was naturalized in 1794, or 1798, must, if considered independently of the period of his emigration, be immaterial, for in either case, it was a naturalization *flagrante bello*, and the existence of a war at both those periods was a notorious fact, of which the underwriters cannot be presumed to be ignorant, and are bound to take notice. *Carter v. Boehm*, 3 Burr. 1905. 1 Black. 593

But it is insisted that on just construction, the representation was, that he was naturalized *in* 1794, for that *since* means *ever since*, and then by our law he must have emigrated to this country in 1792, a period preceding the war. If we are to take the word *since* abstractedly, and ask its meaning, it will be found to signify *after*. If we take it in connection with the other members of the sentence, we can, by a transposition of a single word, give it the same signification: and when we consider the representation was made by a Frenchman; as was admitted on the argument, and that such transposition will make it a literal translation, I presume we shall be justified in so doing. It will then read, "Mr. Coulon is a citizen of the United States, naturalized since 1794." Thus *will the repre- [*292] sentation comport with the fact. The words *since* 1794, are, therefore, too equivocal, and not sufficiently precise, to justify the court in considering the words as representing the plaintiff to have been naturalized *in* and not *after* 1794. We do not, consequently, consider the representation as materially false, and the verdict ought to stand.

Motion denied.(a)

(a) See *Ely v. Hallett*, 2 Gaines' Rep. 60. n.

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ABBOTT *against* BROOME, PRESIDENT OF THE NEW YORK
INSURANCE COMPANY.

If a vessel be rendered, by the perils insured against, unable to proceed with her original cargo, it is a loss of the voyage, though she may be equal to perform it with another more buoyant. When a vessel cannot be repaired for half her value, she may be abandoned. If a vessel be duly abandoned, and the abandonment refused, and at a sale for the benefit of all concerned under an order of a court of admiralty, pronouncing her not worth repairing, she be bought in by a part owner supercargo, it is no waiver of the abandonment; though on her arrival at her home port, she be sold at auction, by the assured, for more than she cost, and he at the time of action brought, have the proceeds in his hands, nor need he make a tender of her to the underwriter when she arrives, nor of her proceeds after her sale.

THIS was an action on a policy of insurance upon one eighth of the ship *Mary*, valued at 2,875 dollars, on a voyage from Batavia to New York, tried before *Lewis*, Ch. J. at the circuit held in New York, in November, 1800.

On the trial it was proved that the vessel, in the prosecution of the voyage insured, encountered heavy and adverse gales of wind, in consequence of which, and upon a general consultation of officers and crew, it was determined to bear away for the West Indies. That the ship, in the beginning of the month of January, 1799, arrived at the island of St. Christophers, in a very disabled state, and was there, *on the application of the master, in co-operation with the supercargo, who was also a part owner of the ship*, surveyed under an order of the court of admiralty, and afterwards unloaded for the purpose of a second survey.

Upon the second survey a report was made, that the ship could not be repaired for the full value of her when repaired; and was in such a state and condition, without particularizing the several damages she received in her hull as well as rigging, that it would be dangerous and unsafe to reload her cargo, and proceed with her on her voyage; that to repair her would be highly detrimental to the in-

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terest of the owners, or the underwriters of the said ship and cargo.

On this, the court, upon the like application, ordered a sale of the vessel for the benefit of the concerned. The sale took place, and at it the supercargo became the purchaser on account of the assured, for the *sum [*298] 4,700 dollars. Upon advice of her situation, the plaintiff abandoned to the underwriters, who refused to accept the abandonment.

It was admitted that the vessel, in consequence of the disasters experienced on the voyage, was so much injured as to render it impossible, from the high price of materials and wages, to repair her at St. Christophers (so as to bring on her whole cargo) for half her value.

It was admitted that in the spring following she came to New York, with a light cargo of rum and molasses, being about sufficient for a set of ballast, and that she might have brought a full cargo of rum, which was proved to be a very light and buoyant cargo. That the interest of all the owners in the vessel was not insured. That on her arrival at New York, she was not offered by the plaintiff to the defendant, but was sold at public auction, without his consent or approbation, for the sum of 10,100 dollars, and was afterwards repaired by the purchaser at a considerable expense.

On this evidence, a verdict was rendered for the plaintiff as for a total loss, subject to be diminished according to such principles as the court should direct.

Hamilton, for the plaintiff. On the facts stated in the case, the application of the general and established principles of the law of abandonment is so clear and plain, that surely no objections can be raised on that point. The right cannot but be acknowledged, and, therefore, to anticipate anything which may be urged against it, will not be attempted. The question on which we apprehend the defendant will most rely, and which, it must be confessed, is of sufficient importance, is whether the repurchase of the vessel by the

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supercargo, did not turn this technical total, into merely an average loss according to the decision of *Saidler and Craig v. Church*. So far from disputing the law of that decision, it is fully admitted; but the circumstances of that case, as well as those in the one in Term Rep.(a) on the authority of which it was in a great measure determined, essentially vary from the present. In *Saidler and Craig v. Church*, and in the case *in Term Rep. there was no abandonment before the re-purchase. In this the reverse is the fact. By re-purchase the court will please to understand notice of re-purchase; for the mere fact, it is conceived, can by no means influence the question. If at any period, the right to abandon from what was known, perfectly and fully attached, if the event then disclosed warranted an abandonment, the right, as it thus stood, cannot be impaired by any actually existing fact which would, if known, have taken it away. In the decision to which allusion has been made, Lord Kenyon observed, there had been no abandonment before notice. It is true, in *Saidler and Craig v. Church*, the re-purchase was not known till after the abandonment: but this was followed by a subsequent proceeding of a very impressive nature. On the arrival of the vessel here, she was taken by the assured, repaired, fitted out, and sent on another voyage. What did this amount to? What could it amount to but a complete adoption by the assured of the act of their agent, as done on their account? The consequence is obvious; it turned into a partial, the claim that had been made for a total loss. This, therefore, constitutes a material difference between the two cases. But there is another circumstance equally important. In the present instance, when the offer to abandon was made, the assurer absolutely refused to accept it. In *Saidler and Craig v. Church*, they were merely passive, and made no reply. When the *Mary* came here she was not employed and fitted out again, but as she was

(a) It is supposed that the case alluded to by the learned counsel is that of *McMaster v. Shoelbred*, 1 Esp. Rep. 231.

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refused, she was sold at auction for the benefit of whom it might concern. Of what was done in the former case, there can be but one possible interpretation; that the assured took her back, and waived their abandonment. In *this* no such thing can be inferred. Every act is consistent with the claim now made. There had been a clear right to abandon, and the abandonment had been refused. To sell the ship was a duty of the assured, and only to prevent to the assurer a total loss, which otherwise must ultimately have resulted. The proceeds are doubtless to be accounted for; but they do not weaken the present claim. The vessel, it will be *said, sold for more than she [*295] cost; but what of that? It is only so much the better for the underwriter. It does not alter the right which had before been exercised, and then stood unimpeached. The ground of the decision in *Saidler and Craig v. Church* was; that the plaintiff had waived his abandonment by taking possession, fitting out, &c. To govern this case by that, it must first be determined whether a sale at auction is equivalent to a fitting out: and this must be done only because there was no offer of her after her arrival here. And even then it must be considered whether this, as a reiterated act, and doing no more than what had already been done and refused, was necessary to be repeated. The sale at auction was a conservative act, done merely to prevent any future deterioration. It was a measure dictated by what had already taken place. The former refusal continued as a guide to the plaintiff's future conduct, and on that he acted. The property was thrown into his hands, and it may, perhaps, be a question whether this did not of itself constitute him an agent for whomsoever concerned? The repetition of the offer of the vessel was a work of supererogation. The waiver of the abandonment could never be considered as an act of intention, or premeditated design. It must arise from implication of law, and on the principle that a second obligatory offer, is, by law, absolutely necessary. That the mere selling a property insured is not a waiver of a previous

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abandonment, the decision of this very court has, it is believed, firmly established. In *Bouns v. The New York Insurance Company*, after a refusal of an abandonment, the goods arrived and were sold by the assured. It was held by this bench, that the sale was justifiable from the conduct of the underwriter. To be sure, a second offer might have been made, and had the advice of counsel been asked, it is more than probable it would *ex cautela* have been recommended: but it was by no means necessary, because the insurer had, from his conduct, rendered it superfluous. He, the person entitled to the ship, which was then in the hands of the plaintiff, constituted him, by the refusal to [*296] accept her, an agent, as the foreign writers term it, from necessity, lest an absolute loss of the whole subject matter should ensue. To preserve it was to the advantage of all parties. If the plaintiff was to have it, his interest required that care should be taken of it; if it was to fall to the underwriter, certainly his equally so, because he lessened his payment, and in the present case actually made a profit.

Hoffman and Harison, contra. Whether the present is to be considered as a partial or a total loss is, in fact, the only point in controversy. That it is partial, the defendant insists: for this case is in no respect to be distinguished from *Shaw and Goold*, (*Edward and Charles Goold v. John Shaw*, reported Lex. Mer. Amer. 295,) decided in this court, and confirmed on a writ of error: so that the principles there recognized are now to be taken as the settled law of the land. There the damage to the cargo did not affect the policy on the ship; because she was in a capacity to complete her voyage, though she did not do it on account of the injury her cargo had sustained, in consequence of which it was sold in Martinique. It follows, from the authority of the case referred to, that, as in insurances, freight, vessel and cargo, are distinct interests, the total loss of one by no means constitutes a right to abandon on the others.

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The underwriter on the ship has nothing to do with the cargo; and though the Mary was sold in St. Christophers, and the voyage thus broken up, as it is termed, that did not give any rights to the assured on the vessel. The interests were totally unconnected; an insurance on the voyage being by no means synonymous with one on the ship. For this distinction, the court will find a sanction in *Poole v. Fitzgerald*, Willes' Rep. 641.(a) The fact, however, here was, that the voyage was not lost, for the vessel arrived with a cargo and earned freight. So that allowing the loss of the voyage to mean a loss of the ship, and therefore, to give a right to abandon, and claim for a total loss, still that loss had not taken place, as the vessel could have brought a full cargo, though not the original one. She had lost no freight to create even a technical loss of the voyage. She had earned *pro rata* freight to St. Christophers, and from St. Christophers here she made full freight. There was not only *no loss of the voyage, but a profit- [*297] able one performed; and as to the ship herself, she had arrived in perfect safety. Except, then, this case can be distinguished from *Shaw and Gould*, that decision must control this, and the claim be only for an average, not for a total loss. The determination also in *Saidler and Craig v. Church*, goes on all fours with the present case. The facts were exactly similar.(b) It has been attempted

(a) See the second point made by the Chief Justice, *ibid*, 646, but note the insurance there was on a policy for time.

(b) The frequent allusion to the case of *Saidler and Craig v. Church*, making it in some degree a part of the present, the reporter has thought it necessary to state the facts of it as represented in the case made for the opinion of the court. They were, that the insurance made in the name of Thomas White, was made for and on account of the plaintiffs, and that they were the sole owners of the vessel mentioned in the policy.

That the vessel in her due course on the voyage insured, was captured by a French privateer, and carried into Guadaloupe, and that thereby her said voyage to the Havanna was totally lost.

That at Guadaloupe the vessel was duly libelled in the admiralty court, and was there condemned, and after condemnation was purchased by George Duplex, the master, as for the account of the owners, for the sum of eleven

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to discriminate between them, but there can, in operation of law, be no essential difference between taking possession of a vessel and fitting her out, and taking possession of her and selling her. If so, it can never be meant, from the bare transaction itself, to say it was otherwise, when the sale had been at an advance for more than she cost, and the surplus put in the plaintiff's pocket. It is evident the plaintiff fully intended to adopt the purchase of his super-cargo, who, it must be remembered, was also a part owner, and designed the sale for his own use. The conclusion is almost inevitable, that where a man makes a sale of what was his own, to a profit, he does it for himself. It had been done by the plaintiff without consulting the underwriter: from his own will, and in addition to this, what had been the conduct of the plaintiff since? He had never once offered to account for the sales. If he had meant to have been considered as an agent for the underwriter, as suggested that he was from necessity, he would have offered to account for the profits. Instead of this, he has them now in his pocket, and can justify their being there, only on the ground of the re-purchase having been made on

[*298] account of the former owners. *It had, however, been said, that in *Saidler and Craig v. Church*, the underwriters had been merely passive, but here they had actually refused, and that from hence a diversity between the cases would necessarily arise. In *Saidler and Craig v. Church*, what had passed amounted to a refusal. An abandonment, followed by silence and non-acceptance, amounted to a refusal: for he who does not accept, refuses. If, however, any variety does prevail in the two cases, in this it is stronger against the assured. In *Saidler and Craig v.*

hundred and twenty dollars. That the said master was also a part owner. That the owners had since fitted out the said brig and sent her on another voyage.

That as soon as the owners knew of the capture, and before they were informed of the condemnation, or of the purchase by the captain, they gave the underwriters notice of abandonment.

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Church, the condemnation, sale, &c. were forcible; the result of a capture: but here they were induced at the request and instance of the part owner and supercargo. The plaintiff has received his vessel, purchased in by his part owner; the underwriter, therefore, liable only for repairs. Insurance is no more than a contract of indemnity: if it is to be so considered now, the plaintiff can recover only for a partial loss.

The decision in *Shaw and Gould* is conclusive on the subject. To the judgment then pronounced, every man must accede, because, in insurances, the various subjects of vessel, freight, and cargo, are perfectly distinct; what, therefore, affected the one by no means implicated the others. Suppose a total loss of cargo and freight, let it be either absolutely or technically so, the assured on the ship would not, from *this*, acquire any right to abandon. *That* must depend on other circumstances: it cannot turn on her ability or inability to carry her original cargo. If the vessel can be repaired for half her value, whether she be adequate to the conveyance of her cargo or not, can never give the assured a title to abandon, or claim as for a total loss of the ship. The vessel in question had earned nearly her full freight: the original cargo had paid it; the substituted loading had done the same. How, then, could a total loss be claimed for that ship which was then profitably and advantageously employed? Taking it, therefore, in the most complicated and connected point of view that could reasonably be suggested, there could not be a total loss of the vessel, while the freight was still subsisting. In order to *establish this as a total loss [*299] the plaintiff must still more closely unite the subjects of insurance. He must advert to the incompetency of the vessel to bring home the cargo, and urge this as the foundation of his demand: and because the voyage is broken up on the cargo, the loss of the ship is necessarily to be inferred. This is in direct opposition to *Shaw and Gould*, the contrary of which was expressly determined.



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The trifling variations of that case from this cannot alter the point, for it is not every little change and alteration of circumstances, or any slight change, that would take one out of another. Should that decision not be sufficient to incline the court in favor of the defendant, *Saidler and Craig v. Church* will govern the question. In that, as in this, it must be evident, from all the circumstances, that the purchase was for the benefit and on account of the assured. The property, when in the power of the plaintiff, was never offered to the defendant, and that alone is a waiver of the abandonment. In favor of such a construction, the facts now before the court are stronger than those of *Saidler and Craig v. Church*. There the sale was involuntary and compulsive; here it was not only voluntary once, but twice; and the first sale even at the request of the supercargo and joint owner. Nor was this the whole from whence the construction of the purchase being on account of the defendant might be drawn. There was a shipment, a cargo taken on board on account of the assured. In other respects the cases were alike. In that, an abandonment not accepted; in this, an abandonment refused. In one case the vessel was employed, in the other she was sold. Had not the underwriters a right to be consulted as to the time, place, and manner of the sale? How does it appear that they were not willing to retain her? The plaintiff should have offered them the freight, with the amount of the charges for repairs, &c., and then have claimed compensation under his policy. Instead of pursuing such a line of conduct, the property is disposed of without their knowledge, and is now held. If this can be done, the security of underwriters is destroyed. There would, it must be confessed, be a difference, if the [*300] transaction *had taken place in a foreign country, where no application could be made to the underwriters; but here, when all concerned were on the spot, the parties who were so active, and without making any communication, must be held to have acted for themselves.

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In addition to these circumstances, the court, doubtless, will observe, that the plaintiff has received the freight earned by her, after her being bought in by the supercargo and joint owner. This, it is conceived, is tantamount to fitting out and employing her, and is evidence of her being in the service of her former owners.

Hamilton, in reply. It is difficult to conceive how Shaw and Goold could be connected with the present case; the dissimilarity is so great, it is scarcely possible to imagine how it could be pressed into the service. That case was an endeavor to constitute a total loss of the vessel, on account of a loss on the cargo. It was by the special verdict expressly found, that she could have been repaired for less than half her value; in the present instance it is as expressly stated "that she cannot be repaired for the full value of her when repaired." I shall, after this preliminary observation, endeavor to show, that the principles of that determination will bear on this, and materially aid the plaintiff's demand. For that purpose, it will be necessary to recur to the general position of the court: that in insurances, the various subjects are totally distinct: that in construction of law, vessel, freight, and cargo are separate interests; and it is fully conceded, with the opposite side, that the loss of one does not constitute a loss of either of the others. On these *data* the court proceeded in Shaw and Goold. In that case there was no inability in the vessel; she could have pursued her voyage with her cargo; here she could not. The ability of a vessel to perform her voyage with her cargo, is the very essence of the contract of assurance upon her: it is the *substratum* of the policy. The assured warrants that she is so at the commencement of the voyage, and the assurer engages that so she shall continue, against all the perils enumerated, until it be terminated. If the vessel become unable to complete it *with her cargo, the court must consider it as a [*301] total loss with respect to her, and the policy for-

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feited. Nothing is now advanced, which is not perfectly reconcilable with the distinctness of the subjects of insurance; for the cause of the loss of the voyage was wholly the ship's; it arose from her inability, against which the policy was meant to protect. When that inability could not be removed for half her value, then she, the very subject of insurance, was technically destroyed, and, abstracted from subsequent circumstances, it became a total loss. The after purchase, then, was the only thing which could alter or prevent the result. Suppose her purchased for and by, any other person, how would that vary the underwriter's liabilities or rights? In either one case or the other, he is not defrauded or injured. The purchase on his account by the assured, can never be detrimental; he has the vessel at what she costs, and he has also what she sells for. In the case of *Saidler and Craig v. Church*, the abandonment was overruled, solely because the employing the vessel was deemed a waiver. I must again beg leave to insist on the agency from necessity of the plaintiff, and to deny that being merely passive in cases of abandonment, is equivalent to a positive refusal. The underwriter has 30 days before he is under any obligation to decide on the offer to abandon; during that period, circumstances may require him to be cautious, and hesitate in pronouncing his determination; at this time he is passive. The defendant here refused at once without hesitation. The decision must be whether the offer to abandon ought to have been, and in all future cases must be, repeated after a positive refusal to accept. Living on the spot does not alter the question. To offer a second time would be from courtesy; for after one party has explicitly taken his ground *on that*, the other may act and make it the line of his future conduct. Whether this rule is to be adopted or not, is now to be determined.

RADCLIFF, J. delivered the opinion of the court. In this case, the general question is, whether the plaintiff is enti-

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bled to recover a total or a partial loss? Two objections *have been made against the recovery for [*302] a total loss.

1. That the case of a total loss never existed.

2. That the purchase at St. Christophers by the super cargo, who was also a part owner of the ship, and the subsequent sale at New York, without the consent of the defendant, or a previous offer or tender of the ship to him, amounted to a waiver of the abandonment, and an adoption of the vessel as his own.

With respect to the first, it appears that the ship was condemned at St. Christophers, as unfit to proceed on her voyage, on account of the injuries she had received; and the persons appointed to survey her there certified, that in their opinion, she could not be repaired for her full value when repaired. It is also admitted, on the part of the defendant, that in consequence of the disasters experienced on the voyage, she was so much injured, that it was impossible, from the high prices of wages and materials, to repair her at St. Christophers for half her value, so as to enable her to bring on her whole cargo. It is again admitted on the part of the plaintiff, that in the spring following, the ship came to New York with a light cargo of molasses and rum, being about sufficient for ballast, and that she might have brought a full cargo of rum, which was proved to be very light and buoyant.

On these facts, I am of opinion that there existed a case of a technical total loss, and that the assured had a right to abandon.(a) The question in such cases is not whether the

(a) Whenever the injuries to the vessel within the perils of the policy, are such as to disable her from proceeding on the voyage, it is a total loss of all the subjects of insurance, if other vessels cannot be procured to take the cargo. *Manning v. Newnham*, 1 Campb. 624. But a loss of the voyage as to the cargo is not a loss of the voyage as to the ship; if, therefore, on such an event, she be able or at liberty to perform her voyage, the assured on the ship cannot abandon and claim as for a total loss. *Goold v. Shaw*, 1 Johns. Cases, 293; *Alexander v. Baltimore Insurance Company*, 4 Cranch, 370; *Hurtin v. Phoenix Insurance Company*, 2 Marsh. by Condry, 601. a.

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vessel be in a capacity, or in a situation to be repaired, so as to prosecute her voyage with a half, or any other portion of her cargo, but whether she is capable of proceeding, or of being refitted to proceed, and carry the whole. A vessel is not seaworthy, unless she be in a condition to carry a full cargo. The contrary idea is novel, and inconsistent with every principle of propriety and safety in navigation. The vessel was insured to perform her voyage, and carry her cargo from Batavia to New York. This she was disabled from doing. The enterprise, therefore, failed, [*303] *by means of the perils insured against, and the plaintiff had a right to abandon, and claim a total loss.

The second question is, whether he has waived this right. The vessel was ordered by the court of admiralty at St. Christophers to be sold for the benefit of all concerned. The supercargo, who was one of the owners, purchased her on account of the assured.(a) The assured had previously,

(a) After an unexcepted but effective abandonment the assured are quasi agents, or trustees, for the insurer, and the insurer, as to the subject of insurance, takes, or stands, in the place of the assured. From these two principles it necessarily follows, 1st. That those who were the agents of the assured become the agents of the underwriter, and that their acts as well as those of the underwriter, will, if *bona fide* done for the benefit of all concerned be obligatory on the insurer as his acts, and, therefore, cannot prejudice the rights of the insured: 2d. That the insured cannot claim from the insurer as for a loss of that to which they were not themselves entitled. It results, from these deductions, 1st. That correspondents, consignees, supercargoes, and captains of the assured, are agents of the underwriter. Therefore, if the insured sell, even in the port of departure, the subject underwritten, without a view to his own benefit, it will not prejudice his claim for a total loss. *Walden v. Phoenix Insurance Company*, 5 Johns. Rep. 310. Nor will going, after a loss within the policy from blockade, to a neighboring or other port, and a delivering there to the consignee of the insured, the goods underwritten. *Schmidt v. United Insurance Company*, 1 Johns. Rep. 249. 2d. That on an insurance on freight, though the goods to be carried be so damaged as not to be worth the transport, yet if the underwritten do not entitle himself to it by an offer to take them on, he cannot recover from the insurer. *Griswold v. New York Insurance Company*, 3 Johns. Rep. 321. Nor will the acts of the insurer in saving of the cargo, and being present at

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on receiving advice of her condemnation, and before any notice of the purchase, abandoned his interest to the underwriters, who refused to accept the abandonment. In what manner the supercargo, being also one of the owners, might be affected by the purchase, it is unnecessary to determine. The question is, whether the plaintiff ratified his acts subsequent to the abandonment, and recognized the purchase as his own. In the case of *Saidler and Craig v. Church*, (July term, 1799,) after an abandonment, a similar purchase was made, and the assured adopted it as their own, by availing themselves of the advantage it offered, and fitting out and sending the vessel on another voyage for their own account. Under these circumstances, we considered the assured as having affirmed the purchase, and waived the abandonment.

The present case differs in this, that the plaintiff has done no act to affirm the purchase. He has not appropriated the vessel to his own use, and has not attempted to derive any benefit from the purchase. The vessel was sold at auction on her arrival at New York, and purchased by a stranger. Although it be not expressly stated in the case, the sale must be presumed to have been made for the benefit of the underwriters. It is objected that the plaintiff ought again to have offered to deliver them the vessel, or have consulted them as to the propriety of the sale. I think this was not strictly necessary. The abandonment was an offer to cede all his title and the possession of the vessel, as far as under the circumstances it was capable of being delivered. The plaintiff was not bound to do more and it being a case proper for an abandonment, the defendant ought to have accepted it; or, at least, the refusal was at his peril. He

is unloading and delivery, amount to an acceptance of the abandonment. *Id. ib.* What shall be tantamount is a matter for jury determination. *Bell v. Smith*, 2 Johns. Rep. 98. After an accepted abandonment, all transfers and investments of the property are for the benefit of the insurer; who may maintain *trover* for the articles purchased with it. *Robinson and Hartshorne v. United Insurance Company*, 2 Caines' Rep. 280, affirmed in error, 1 Johns. Rep. 592.

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did not accept, and the plaintiff was necessarily [*304] *left to act as his trustee in the disposition of the property. If he executed the trust fairly, he has discharged his duty, and it was not incumbent on him to follow the defendant, and repeat his application to receive what he ought at first to have accepted.^(a) The sale at auction was, therefore, justifiable, and the defendant ought to be charged with a total loss, deducting the proceeds of the sale, and the value of the freight from St. Christophers to New York.

Judgment for the plaintiff for a total loss

PURDY *against* M. and S. DELAVAN.

An award in trespass that "the said suit shall no further be prosecuted," is sufficiently final and certain, and a good bar to an action on the case for the same offence.

THIS was an action for a conspiracy in burning the plaintiff's barn, and the various articles it contained.

The declaration contained seven counts.

The first stated the plaintiff possessed of a barn and close, containing hay, &c. The defendants, knowing the premises, and contriving to injure, &c. the plaintiff, by a certain conspiracy, confederacy, and agreement, did cause the barn, &c. to be set on fire, destroyed and consumed.

Second like the first, except that the defendants did conspire to set on fire, and cause to be set on fire, and consumed, and destroyed, the barn aforesaid, containing, &c. and by means of the conspiracy aforesaid, the barn was set on fire and consumed.

(a) Where the loss was total at the time of abandonment, on a subsequent arrival, tender and refusal, holding the property 60 days, selling it and giving credit to the underwriter for the proceeds, said to be no obstacle to recovery *Livingston v. Hastie and Patrick*, January, 1803. But see, as to this point, *Church v. Bodient and others*, 1 *Caines' Cases in Error*, 21, 42, 43

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Third. The same, stating that the defendants, by conspiracy, &c. did procure the barn, &c. to be set on fire, destroyed, and consumed.

Fourth. That the defendants did conspire, &c. to set on fire and cause to be set on fire and destroyed, the barn last aforesaid, &c. with an averment that the barn was, in pursuance of the conspiracy aforesaid, set on fire and consumed.

Fifth. That the defendants, by a conspiracy before had, did cause and procure the barn to be set on fire and consumed.

Sixth. The same, only enumerating the contents of the barn.

Seventh. That the defendants conspired to set on fire, *and they, in pursuance of their conspi- [*305] racy, did, &c. and did cause to be, by fire destroyed, the barn aforesaid.

All the counts began as in trespass, "for that," concluding with "*alia enorma* against the peace," &c.(a)

The defendants separately pleaded the general issue, with a notice, that on the trial they would severally give in evidence a former suit in trespass against the defendant Mathew, Hannah his wife, and the other defendant Samuel, for breaking the close of the plaintiff, and also for burning his barn, containing, &c. and that they would give further in evidence a submission of the said suit by the plaintiff, on the one part, and the said Mathew and Hannah for themselves, and the said Samuel their son, an infant, on the other part, to the arbitrament of certain arbitrators mentioned, and their award thereon made, by which the plaintiff was ordered to "*to no further prosecute the said suit*," and to pay the defendant, Mathew Delavan, 14 dollars and 68 cents costs; and further, that the suit on which the said

(a) It has been said that an action upon the case is founded upon a wrong, and concludes *contra pacem*. Vaugh. 101; F. N. B. 92, E. But this is a mistake, for actions *contra pacem* are a species of actions *vi et armis*. See 1 Mor. Vind. Mec. 65.

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award was made, was for the same trespass for which the present action was brought. The submission and award were in the following words:

"The condition of the above obligation is such, that whereas a barn of the above Ebenezer Purdy hath been destroyed by fire, together with hay, grain, and other valuable articles which it then contained: and whereas the said Ebenezer Purdy hath instituted an action in the supreme court of judicature of the state of New York, against the before-named Mathew Delavan and Hannah his wife, and Samuel Delavan his son, for burning and destroying said barn, in which action the said Mathew Delavan, Hannah his wife, and Samuel Delavan, have pleaded not guilty, so that the said action is now at issue: and whereas it is just and right that if the said Mathew and his wife and his son, or any, or either of them have or hath in fact, burned or destroyed the said barn, or have or hath in any manner aided, abetted, assisted, contributed, occasioned or been privy to the burning or destruction thereof, (which they [*306] and each of them wholly deny,) *that then he the said Mathew Delavan shall pay Ebenezer Purdy all the damages he hath sustained thereby, which the said Mathew Delavan hereby agrees to do. And whereas the said Ebenezer Purdy and Mathew Delavan have mutually agreed to discontinue the said action, and to submit all questions, disputes, and controversies touching the destruction of the said barn and the contents thereof, and the damages the said Ebenezer Purdy hath sustained thereby, to the judgment and award of Epenetus Wallace and Hachaliah Brown, Esq. and Stephen Gilbert, farmer, or any two of them, arbitrators mutually chosen by and between the said parties, to arbitrate, award and determine, *touching the premises*. Now, therefore," &c.

The award set forth that "whereas a *certain suit* has heretofore been commenced in the supreme court of judicature of the state of New York, by Ebenezer Purdy against Mathew Delavan and Hannah his wife, and Samuel Dela-

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van, his son, for the burning and destroying the barn of the said Ebenezer Purdy by fire: and whereas for the putting an end to the *said suit*, they, the said Ebenezer Purdy and Mathew Delavan, by their several bonds and obligations bearing date, &c. Now, know ye that *we the said arbitrators, whose names are here- [*307] unto subscribed, and seals affixed, taking upon us the burthen of the said award, and having fully examined and du considered the proofs and allegations of both the said par. as so made, publish this our award by and between the said parties, in manner following, that is to say, first, we do award and order, that the *aforesaid suit* shall be no further prosecuted: and further, we do award and order that the said Ebenezer Purdy shall pay, or cause to be paid, unto the said Mathew Delavan fourteen dollars and sixty-eight cents, in full, for his costs and expenses in defending the aforesaid suit, and also for his expenses and attendance on this arbitration. In witness," &c.

The defendant's counsel then moved the court to direct the jury to find a verdict for the defendants, on the principle that the submission and award so given in evidence barred the plaintiff of a right to maintain his present suit, which motion the judge overruled, declaring his opinion to be, that the award was not conclusive between the parties, so as to bar the plaintiff of his present action, with liberty, however, to the defendants to reserve the point, which was accordingly done.

The jury being charged by the judge upon the issue of not guilty, and having returned to the bar, said, they found the defendants guilty of the matter contained in all the counts in the declaration except the last, and of those matters they found the defendants not guilty.

Woods, for the defendants. The present motion is to set aside the verdict, and, if the court should be of opinion against us on that point, to arrest the judgment. On one of these grounds we must prevail, and for that purpose "

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shall contend that the award was, on the trial, final and conclusive evidence to bar the action; secondly, that the verdict finding the defendants guilty as to the first six counts, and not as to the seventh, is contradictory; thirdly, that this action, as it at present appears by the record, cannot be supported, being evidently a suit in trespass, which will not lie for a conspiracy, as the remedy ought to be by an action on the case. On the first point it must be admitted, the award was intended to be final and conclusive as to the burning the barn, &c. The plaintiff ought not to be permitted, after a suit for that very cause, and submitting it to arbitrators, who take on themselves the burthen of the award, and absolutely make it, to bring another suit for the same offence. The plaintiff cannot, by merely varying his form of proceeding, (if there be any variance in this case,) bring a subsequent action on the same grounds. The award is final and conclusive, therefore, on the *cause of action*, not the *mere proceedings*: it says, the "aforesaid suit shall be no further prosecuted." This must be taken as if it had been declared, the defendants shall never again be impleaded for burning the barn. The rule of construction in awards is more than it formerly was: the courts look to what was designed, because the arbitrators are judges of the parties' own choosing, and not tied down to technical rules. In *Strangford v. Green*, 2 Mod. 228, the submission was, by the defendant on behalf of himself and partner, of all differences and controversies between them and the plaintiff. The award was, "that all suits which are prosecuted by the plaintiff against the defendant shall cease." This, said the court, has the effect of a release. So here, that the "suit shall no further be prosecuted," will have the same operation. Another inference is to be drawn from this authority, in answer to the objection that may be made, of the submission being only by some of those who were proceeded against in the first action: but they had a right to refer for the other, as they were the parents of the defendant

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Samuel. In the case cited, one partner submitted for all, and yet the award was not on that ground impeachable. The same principles will be found in Kyd, 212. *Hawkins v. Colclough*, 1 Burr. 274. *Gray v. Gray*, Cro. Jac. 525. So in *Harris v. Knipe*, 1 Lev. 58, an award "that all suits and controversies *shall cease*," was held good and *mutual, though no other part of the award was [*309] valid. In *Simon v. Gavi*, 1 Salk. 74, the words were, "that all suits now depending *shall cease*," and it was urged in error to be final, "because the meaning is not that the party shall give over and begin again; but that the suit should absolutely cease for ever, so that the *right* is gone, because the *remedy* is." Even an award "that a suit in chancery shall be *dismissed*" is final; because the court "will intend this a substantial dismissal and perpetual cession." *Knight v. Burton*, 1 Salk. 75. 3 Vin. Abr. 67, pl. 28. As the second point will be spoken to by the other counsel in the cause, it will be necessary only to go to the third. The whole declaration is for a direct trespass: if so, it is not maintainable on a conspiracy. The mode ought to have been by an action on the case, or a writ of conspiracy, according to the register. That the present is a declaration in trespass cannot be doubted. The beginning of each count is "for that," and not circuitous, as is necessary in actions on the case, which, being for consequential damages, commence with "for that whereas." This declaration, therefore, cannot be in case; and if it be trespass, it will not lie. It will be found, on examining the authorities, that a bare conspiracy, without any act done in consequence, cannot be the foundation of any suit. The first six counts, though they allege conspiracy, and that the barn, &c. was burnt, do not charge us with it. If, in addition to this observation, there is any technical rule by which this declaration will be deemed trespass, the court will apply it. In *Scott v. Shepherd*, 3 Wils. 408; 2 Bl. 892, the court held *vi et armis* conclusive on the question; here

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the words are against the peace of the people, which is tantamount. Are not the counts charging a direct injury to the plaintiff? Do they not show it in express terms? If so, shall it be permitted the plaintiff, by adding the words conspiracy, &c. to use the declaration just as it suits his purpose? as case to maintain the suit as a conspiracy; and when objected to on account of form, to turn round and say it is trespass. If it be so, it is the same as saying the defendants burnt the barn, and negatives that [*810] they caused it to be burnt. There is no method of supporting the declaration, without first setting aside all the rules of pleading which relate to trespass and conspiracy.

Colden, Hoffman and Munro, contra. We shall first speak as to the award. It is necessary that all awards should be final; and, therefore, either to be nonsuit or discontinue is insufficient, though to enter a *retraxit* is good. These positions show the nature of awards on this point. That *all* suits shall cease comes within the rule of a *retraxit*, but that a suit shall be no further prosecuted cannot: the court, however, will determine whether they are tantamount. But this is not the real ground of objection; the one most relied on is, that the award is not of the matters which were submitted; that it differs from the submission. If this be the case, it is void, and no averment in pleading, not even an affidavit of the arbitrators as to their meaning, can help it. For this the court will find authorities in *Bacon v. Dubarry*, 12 Mod. 129. Dyer, 242, b.; Kyd on Awards, 207. The award must set forth that it is on the matters submitted. What, then, was submitted? has the award been made in pursuance? The arbitration bond mentions, "all questions, disputes and controversies, touching the destruction of the said barn," &c. It does not submit the question of *that suit*. The arbitrators were empowered to determine matters not the basis of that suit:

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yet they confine themselves to award on that, and determine against the plaintiff. The award begins, "whereas a *certain suit*," ascertaining what is meant by them. They then proceed and say, "that the *aforesaid suit* shall be no further prosecuted," when they were determine on *all controversies*. On this account, therefore, the award is void; for the submission was of all, and they have confined themselves to *one*. Besides, they only say, "if he shall abide the award," and not "on the premises." From the case, it appears, the award was properly rejected; it is not stated that any evidence was given on the trial, of any connection between the suit *then* brought, and the suit *referred to* by the award.

The rule laid down in *Scott v. Sheperd* is no doubt correct; that case decided *vi et armis* to *be [*311] in trespass. Where the declaration is not in those words, the action is in case: so here, it not being stated to be *vi et armis*, the suit must be considered as on the case for a conspiracy, and every count expressly alleges, that the act conspired to be done was absolutely performed. Here the conspiracy is the *gist* of the action, and *that* being found, the words "against the peace," &c. may be rejected. Com. Dig. tit. Pleader, E. 12. 1 Bac. Abr. 94. In Herne's Pleader, 235, a precedent in point will be found. As then, the *contra pacem* may be rejected, even allowing that the formal commencement of each count "for that" is bad in case, it is settled wherever there may be the same plea and judgment, different counts may be united.^(a) *Brown v. Dixon*, 1 D. & E. 276. *Dickson v. Olifton*, 3 Wils. 319. *Mast v. Goodson*, 3 Wils. 354. So here, as we have an alternative either to bring case or trespass, 3 Black. Com. c. 12, p. 208, take it either as one or the other, it is well brought. But, at all events, it is now too late to take advantage of this informality intended to have been insisted

(a) The rule is rather where the process, plea and judgment are different, the counts cannot be joined. See Tidd's Prac. 12, n. w.

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on; it ought to have been by way of demurrer to the declaration. The English authorities cannot apply exactly to the present case. By them, the civil injury is merged in the felony: our state act(a) prevents that, and, therefore, nothing perfectly alike can be found in their books. That the verdict is contradictory, has not been touched on in argument, though made a point in the outset. If the position of the other side is true, there never can be a conviction upon one count of an indictment, where there is an acquittal on another. The trespasses in the several counts are supposed to be distinct; the finding, therefore, on one does not contradict that on the others, and the plaintiff may take his verdict, and have judgment on that which is for him. The court may view this case now before them as one with a double aspect; either to set aside the verdict, or to arrest the judgment. The latter will never be done, where sufficient appears on the record to enable the court to pronounce. On a general or special demurrer, it [*312] might have been otherwise. In *Brownlow*, *70.

a similar declaration is to be found; an action for a conspiracy in the nature of case, ought to be without *vi et armis*. *Herne*, 71, 88, 147, is as here. The true distinction has already been taken between case and trespass, and there is no other; the latter is *vi et armis*, the other not. To answer the position, that in an action on the case there is always a recital, it will be enough to state that slander is without a recital. This, therefore, proves that counts in case begin as well with, as without one, and as it is now after verdict, *against the peace* must be rejected as surplusage, and then the declaration is plainly case. The contradiction in the verdict can be supported only by the court's intending that all the counts are for the same trespass, but no intendment is ever made to overturn a verdict.

Benson, in reply. The counsel for the plaintiff contend

(a) The act for regulating certain proceedings in criminal cases, 31st March, 1801, c. 60, s. 19. 1 Rev. Laws of N. Y., 264.

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that the declaration is right. That it is either case or trespass: if not good as one, then good as the other. But surely they ought to elect in what suit they will proceed; whether in trespass or in case. If in trespass, the award is clearly a bar on their own position, as it was made in an action for a trespass; if in case, why conclude against the peace? A plaintiff may count as he pleases, but he cannot say trespass is case, and case trespass. The suit must be one or the other, and cannot be both. Strike out all that relates to trespass, and then there never was such a declaration seen. If the action is for the consequence of burning and the injury, it is consequential reparation that is sought and must be case. If it is for the actual burning, it must be trespass. It must be one or the other, and cannot be both, at the fancy and will of the plaintiff. He cannot bring trespass, and call it an action in the nature of a conspiracy. But if one thing is to be rejected in substance and terms, and another to be added from intendment and supposition, a declaration may be made out of any thing. Trespass it cannot be, for the words in all the counts are conspiring and conspiracy: and case it cannot be, for they all begin and end in trespass. The authorities from Kyd, 207, and 2 Lord Raym, 961, will, on reading, be found *against Mr Colden's positions. The case stated [*818] that we offered to give in evidence the award, and to prove that the matters submitted were the same as those charged in the trespass. This was overruled; the verdict, therefore, must necessarily be set aside.

LIVINGSTON, J. This was an action of trespass for burning the plaintiff's barn.

The award was not considered as a bar to the present suit, by the judge at the circuit, under whose direction, to that effect, the jury found the defendants guilty, and we are now to say whether this direction was right or not.

If the award was certain and final, it was a bar, and
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should have been so received. To me it appears to possess both of these properties.

The arbitrators were to determine,

1. Whether the Delavans had destroyed the plaintiff's barn, &c.

2. What retribution was to be made him for such destruction. If they thought the Delavans innocent, then they were further to decide how they were to get rid of the plaintiff's claim, and be reimbursed for the expense which it had occasioned them. All these matters were clearly within the submission.

These duties might be performed either in terms, by awarding a certain sum to be paid by a fixed time, and directing releases to be mutually exacted, or by a mode of expression, which, although not so explicit, could convey no other meaning. When they order the suit to be no farther prosecuted, and Purdy to pay the costs of it, and the expense of the arbitration, they hold a language which cannot be misunderstood. If that suit can be no further prosecuted, will it be right to permit the plaintiff to evade a decision made by judges of his own choice, by commencing another action for the same injury? Will this court permit to be done indirectly what they have ordered shall not be done directly? Awards are more liberally interpreted than formerly. This relaxation is carried to such length, and very properly, that it is sufficient if they are certain, according to a common intent, and consistent [*314] with fair presumption. It is matter of surprise, that courts should ever have disturbed awards, when from the whole of them it was fairly to be collected, that the arbitrators proceeded on the matter submitted, and had decided every thing left to them. To an avidity of business, or an excessive jealousy of the interference of laymen, in matters which they deemed exclusively of their own province, must be imputed their readiness to listen to objections against decisions of this kind, and to set them aside under pretence of their being uncer-

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tain or inconclusive. More enlarged views at length prevailed, and judges discovered a laudable solicitude to maintain these extrajudicial determinations, and thus put an end to controversies, if this could be done without violating certain fundamental rules, from which it was thought unsafe to depart. If certain to a common intent, and final, courts will not easily be induced to depart from them, and send the parties to a new litigation. That the award before us has these characteristics, can hardly be doubted. Whoever runs, may read and understand. It expressly states that the arbitrators proceeded on the matter submitted, and if their directions, which are intelligible to any capacity, are pursued with good faith, their decision will be final as well as certain; for, nothing more is necessary to render them so, than the plaintiff's not prosecuting further his suit or action, by which may be understood his claim on this account, and paying the sum mentioned. The cases in 1 Burr. 274, and in Lord Raym. 961, admitted of more doubt, and yet those awards were adjudged certain and final. In my opinion, therefore, this award ought to have been regarded as a bar, and the jury should have been directed accordingly. On this ground, I am for a new trial, which renders it unnecessary to examine whether the verdict be contradictory or not. There was also a motion in arrest of judgment, but if a new trial be granted, and the present verdict set aside, this application cannot prevail, and, therefore, it may be unnecessary to express an opinion on the grounds of it: but as this question was fully argued, *and may possibly [*315] come before us again, I am ready to say that if a new trial had not been granted, I should not have been for arresting the judgment. Trespass, in my opinion, is the proper remedy for a direct and immediate injury of this kind, and the present resembles that species of action more than any other. It is true, it is somewhat out of the common form, and that some expressions are found in it not appertaining to actions of trespass, and which give it the

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appearance of an action for a conspiracy. But after verdict, I should reject these expressions as surplusage, rather than cause judgment to be arrested.

KENT, J. I coincide in the opinion given, but shall state my reasons a little more at large. The defendants' motion is for a new trial, and in this application is united a motion in arrest of judgment. I shall consider only the first; and in this the great question is, whether the award ought to have been received in evidence as a bar to the present suit. If the award in question be good and valid, in pursuance of the submission, it may undoubtedly be pleaded or given in evidence; as this suit is for the same matter which was the subject of the submission. *See Kyd on Awards, 242.*

Awards are to be liberally construed, because they are made by judges of the parties' own choosing. *1 Burr. 277; 2 Wils. 268.* But they must have two properties. They must be *certain* and *final*.^[1] This certainty, however, is judged of only according to a common intent, consistent with fair and probable presumption. In the present case, the bonds of submission recited, that the plaintiff's barn had been burnt, and that he had instituted a suit against the defendants, and the wife of one of them, for burning the same, which charge they had denied; that the parties had agreed to discontinue the suit, and submit all questions and controversies touching the destruction of the barn, and the damages, &c., to arbitrators. The award stated, that a certain suit had been commenced as aforesaid, for burning the barn, and that, for putting an end to the suit, the parties had, by their bonds as aforesaid, submitted to the award and final determination of the arbitrators.

That the arbitrators, taking upon themselves the [*316] burden of the submission, and having fully examined, and duly considered the proofs and alle-

[1] *Waite v. Barry*, 12 Wend. 377; *Vosburgh v. Bane*, 14 J. R. 302; *Jackson v. Ambler*, id. 96.

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gations of the parties, did award, that the said suit should be no further prosecuted, and that the plaintiff should pay to one of the defendants 14 dollars and 68 cents, for his costs and expenses in defending the suit, and attending the arbitration.

On this statement of the substance of the submission and award, it appears to me that the reasonable and common intendment, from the language of the award, is a determination of the *merits* of the cause. The present cause of action was fully and explicitly submitted. The award refers to the bonds of submission, and, of course, the arbitrators had their eyes fixed on the merits of the complaint, and the *intent* of the submission. The award states, that the proofs and allegations of the parties had been examined and considered; of course, the merits must have been fully heard. It then adjudged, that the said suit shall be no further prosecuted, and that the plaintiff shall pay the costs. This award could not have intended merely a cessation of the suit referred to in the bond and award, with liberty to institute a fresh suit on the same matter. This would have rendered the award altogether useless and absurd. The bonds had stated already that the parties had agreed to discontinue the suit. The palpable intent and meaning of the award was, that the *charge* of the plaintiff was not supported, and that the same should be no further prosecuted, and should forever cease. We are to consider the award as drawn up by men who were not skilled in technical language, and that it refers to, and is bottomed upon, the bonds of submission, which had declared the agreement of the parties to be, that the then existing suit should be no further prosecuted; that the parties, by their proofs and allegations, must have furnished the arbitrators with a full discussion and knowledge of the merits of their controversy; that the law requires awards to be liberally and favorably expounded; so that they may answer the purposes for which they were intended; and under these considerations, we cannot doubt of the intent of these words

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"that the said suit shall be no further prosecuted."

[*317] It was as *if they had said, the defendant shall be no further prosecuted upon the charge; for why say the existing suit should be no further prosecuted, if no more was meant than what the parties had already agreed to do? why say that the suit shall not be further prosecuted, and the plaintiff may pay the costs, if a new suit may be immediately brought? There was no possible use in such an award. It would not answer the terms or intent of the submission. Such a *literal* interpretation has no reason to support it. It would not be liberal or favorable. It would not be judging the award by a common intent, nor rendering it consistent with probable presumption. It would be contrary to the modern established rules of interpretation, and is, consequently, to be rejected.

It has indeed been held that an award, declaring that a party should be *nonsuited* in an action he had brought against the other, was not good, because it was not putting a *final* end to the controversy, as a nonsuit was no bar to a new action. Kyd, 140, 141, 6 Mod. 232. Upon this case, it has been observed, that had this been a new point, and *res integra*, it might have been said, in analogy to the construction put on other cases, that he who suffered a nonsuit, but afterwards brought another action, *nominally* performed the award, but *in substance* was guilty of a breach. The word nonsuit has, however, become so peculiarly appropriated to express one particular idea, that its meaning cannot be extended. But if an award be, that an action be *discontinued*, this is held to be good and final, although a discontinuance does not, in a technical sense, bind a party from bringing a new suit. Kyd, 141, 142. This is a case strongly bearing upon the present; for awarding that a suit shall be no further prosecuted, is equivalent, at least, in strength and efficacy, to saying that such suit shall be discontinued.

So, an award that a suit in chancery between the parties should be *dismissed*, was good and final; for it must be

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understood that it shall be dismissed and cease forever; that is, a substantial dismissal and cesser, and not the shadow of one. *Knight v. Burton*, 6 Mod. 232; 1 Salk. 75, S. C.

*So an award that *all suits between the parties shall* [*318] *cease* is good; for the meaning is not that the party should give over and begin again, but that the suit should cease absolutely forever, so that the right itself is gone with the remedy. The same construction was given to these words in an award, that all suits *which are prosecuted* by the plaintiff against the defendant, shall cease. *Squire v. Grevell*, 6 Mod. 34; 1 Salk. 74; 2 Lord Raym. 691; *Stangford v. Green*, 2 Mod. 228; see also Cro. Jac. 525.

The only authority I have met with, which holds up a contrary interpretation, is that of *Tipping v. Smith*, Stra 1024. There it was held, that an award that all manner of proceedings if any, depending at law, should be no further prosecuted, was not good, because not final. This is a very short and imperfectly reported case, and it is against the general current of authorities I have alluded to. Considering, therefore, the benignity with which awards are of late expounded, and the sense and justice of the one construction, in preference to the other, I cannot permit it to have any influence upon the other decisions. The cases appear to me, therefore, to be in coincidence with the reason of the thing, and to require the interpretation I have given to the award: that, according to a common intent, the design and operation of it is a final cesser of the controversy submitted. There is no ground for a distinction, that an award which shall say a suit shall be *discontinued*, or *dismissed*, or *shall cease*, is good, and an award which shall say *a suit shall not be further prosecuted*, is not good. The force and effect of the expressions are the same.

But it was objected at the argument, that the award was not of the matter submitted. This, however, is a mistake. Both the bond and award state, that a suit had been instituted for burning the barn, and the bond states, that for

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putting an end to all questions and controversies concerning that charge, the submission was made. Putting an end finally to the suit concerning the barn, was putting an end to the controversy. The award was, therefore, as I understand it, strictly concerning the premises. In one of the cases already referred to, the parties submitted *all controversies* between them to arbitrators, and the award [*319] **was*, that all suits which were prosecuted by the one party against the other, should cease, and it was held good. 2 Mod. 228.

It may not be unnecessary to notice another rule applicable to awards, which is, that they must be *mutual*, or not give an advantage to one party, without an equivalent to the other. Kyd, 148. But this mutuality is nothing more than that the thing awarded to be done, should be a final discharge of all future claim by the party in whose favor the award is made against the other, *for the causes submitted*, or, in other words, that it shall be final. Thus in *Baspole's Case*, (8 Co. 97, b.) the submission was general, of all matters and demands; and the award was, that one party should pay to the other a certain sum in consideration of a debt long due, and for his costs, and said no more. The award was held good; for the one party received the money, and the other was discharged from the debt, which was a sufficient reciprocity. Com. Rep. 328. So where a certain alleged trespass was submitted to arbitrators, to arbitrate concerning the said trespass, and divers suits concerning the same pending between the parties, and the award was, that the defendants should pay a certain sum and certain costs in and about the suit arising; it was objected, that the award was on one side only, for it directed nothing as to the other party, there being no releases awarded, nor words of satisfaction used: but the award was, upon demurrer, held good, and, therefore, it may now be safely laid down in the words of Mr. Kyd, (p. 158) that an award need not contain any equivalent terms; for a discharge to the other party must necessarily be presumed from the pay-

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ment of the sum, or the performance of the act.[1] As I hold the award to be good, it goes to the determination of this case, and it will be unnecessary for me to consider the other point that was raised at the argument. I accordingly conclude, that the evidence offered ought to have been received, and considered as a full and effectual bar to the present suit, and that the verdict ought to be set aside for misdirection, and a new trial awarded, with costs to abide the event.

LEWIS, Ch. J. This is substantially an action by the plaintiff against the defendants for consuming, by fire, his *barn, together with its contents. [*320]

The defendants pleaded the general issue, and gave notice that on the trial they would give in evidence, in their discharge, an arbitrament and award on the subject matter of the suit.

On the trial, the judge not supposing the evidence sufficient to bar the plaintiff's action, so directed the jury, and they found a verdict for him.

To avoid the effect of this verdict, two motions are now before the court. The one for a new trial, the other in arrest of judgment.

In support of the first it is contended, that the award was conclusive between the parties, and that the jury ought to have been so instructed.

The bond of submission states, that the plaintiff had commenced a suit in trespass against the said Mathew Delavan, Samuel, his son, (who appears to be an infant,) and Hannah, the wife of the said Mathew, for breaking and entering his close, burning his barn, &c.; that the parties, viz. the plaintiff and Mathew, had mutually agreed to discontinue the said suit, and to submit all questions, disputes and controversies, touching the destruction of the said barn *and the contents thereof, and the damages the [*321]

[1] *Wood v. Ellis*, 3 Cal. R. 253; *Byers v. Van Dusen*, 5 Wend. 268.

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said Ebenezer had sustained, to the judgment and award of three arbitrators.

These arbitrators, in their award, after reciting the pendency of the said suit, and the submission of the parties for putting an end thereto, award that "*that the said suit shall be no further prosecuted*, and that the plaintiff shall pay the defendant Mathew 14 dollars and 68 cents, in full for costs and expenses."

Awards are, at the present day, construed with much greater liberality than formerly; and from a current of authorities, it appears to be now held, that *an award that a suit shall cease, or be no further prosecuted*, not only arrests such suit, but also takes away the right of action on which such suit was founded. 1 Salk. 74, 75, Raym. 961; 6 Mod. 38.

But though this be the effect, it is necessary that such award have the essentials to a good one. It must, in some cases, be mutual; in every case certain and final between the parties. It must be also on the matter submitted. The award before us appears to me to want many of these essentials. It is one in which mutuality is essential, and hath not been regarded. It is not final, nor on the matter submitted. Nothing is awarded to be performed on the part of Mathew Delavan. Not even to give a receipt in full on payment of the 14 dollars and 68 cents. Nor are his hands, nor those of his son, tied up from bringing a suit or suits against Purdy, for any injury sustained by the charge made against them, or for the suit brought against them beyond costs and actual expenses. The then pending suit was no part of the submission. It is expressly stated in the bond that *that was*, by previous agreement between the parties, to be discontinued.

I therefore think the direction to the jury was right, and that the motion for a new trial must be denied.

In support of the motion in arrest of judgment, two positions are advanced.

1. That the finding of the jury is repugnant and contra-

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dictory. This was also made a ground on which the motion for a new trial was founded.

*2. That the plaintiff has misconceived his action, [*322] and, perhaps, blended actions of different species.

If all the counts in a declaration are to be considered as constituent parts of one cause of action, there would be some foundation for the first position; though, even in that case, I should doubt its vitiating the verdict. For the meaning of the jury is, that the defendants did cause the barn to be burnt by conspiracy, but did not do it with their own hands; and it is not to be expected of them that they shall be acquainted with principles or maxims of law. But a conclusive answer is, that the counts of a declaration are wholly unconnected, each being considered as a distinct declaration, and if a jury give a verdict on a single count, where there are several, without noticing the others, it will be good, provided they find all that is in issue on that count.

The only remaining questions are, whether the plaintiff has misconceived his action, or has blended distinct species of actions.

On the argument, the counsel for the plaintiff were unwilling to say whether they considered their suit in trespass or in case. The last count is in trespass beyond doubt; and I think there is not much doubt that the other six are equally so, and that the conspiracy is mere matter of inducement, or perhaps surplusage. They have two of the characteristics of trespass. The charges are *direct* without recital, and the injury complained of is stated with a *contra pacem*. It only remains, then to inquire whether this action will lie, or whether case is the appropriate remedy. Where the action is founded on tort, the boundary between case and trespass is faintly delineated, and not easily discerned. The most marked distinction is, where the injury is *immediate*, and where it is *consequential*. There are also others, (which will not, however, apply to all cases,) as where it is accompanied with force, and where it is not; where it is done on the immediate possession of the plain-

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tiff, and where done elsewhere, though it damage such possession. In the case before us, the injury, if any, [*323] was accompanied with force. *It was done on the possession of the plaintiff, and must have been accompanied with an unlawful entry. It was immediate; for whether done by the defendants, or by their procurement, they are equally principals, and the maxim of *qui facit per alium, facit per se*, will apply to them. Nor will it, in my opinion, vary the case, though the *conspiracy*, and not the *burning*, should be considered the gist of the action. For, in that case the burning must be considered as introduced under a *per quod*, which the form of each of the six counts will warrant.

I have not been able to meet with any authority which determines that trespass will not lie for a conspiracy to commit a trespass, where an actual trespass is the consequence. It differs materially from the case of a conspiracy to cause a person to be indicted or arrested; for there the intervention of an intermediate agent, who cannot be implicated in the guilt, is essential to the injury. Here the intermediate agent, if any is restored to, is the mere instrument in the hand of the principal, and the injury is emphatically his own.

But what puts this question at rest, in my opinion, is, that after verdict the court never will, in a case where the line is so nicely drawn, inquire whether the facts will warrant trespass or case. Such was the decision in *Slater v. Baker and Stapleton*, 2 Wils. 359, recognized in *Scott v. Shepperd*, 2 Bl. Rep. 897, by *Blackstone*, J. who, while he differed in opinion from his brethren, declared, that after verdict, the court will not look with eagle eyes to spy out a variance,

I am, therefore, of opinion, the plaintiff ought to have judgment according to his verdict.

New trial granted. (a)

(a) See *Munro v. Alata*, 2 Gaines' Rep. 320, and notes.

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R. LYLE against CLASON, and CLASON against R. and J. LYLE.

If cross suits be referred to the same referees, and they make up their report in each; under the idea that one shall be a set-off to the other, the court will set aside both, if the suits be for demands which cannot legally be set off. An agent's agreement to give part of the profits arising from merchandise intrusted to him, in order to sell under the contract of another person, is obligatory on his principal.

THESE were cross suits, brought under the following circumstances:

On the first of September, 1793, Robert Lyle engaged with Clason to go to Europe as his agent, and transact his business at a salary of 150*l.* per annum, New York *currency, besides his expenses. In consequence [*324] of this arrangement, Robert Lyle embarked on board a vessel of Clason's called the *Haré*, destined to Hamburg, with a cargo of sugar and coffee. In an account made out by Robert Lyle against Clason, he charges his salary for six months, at 42*l.* 3*s.* 4*d.* ending in March, 1794. No evidence appeared that Clason, either then, or at any after time, discharged Lyle from his service; and in an account rendered by him to Robert Lyle, he gives Lyle credit for one year's salary, at the above rate.

In March, 1794, at which time John Lyle was employed in the loan office of the United States, Robert was in Paris, and while there, entered into a contract with the French government, ostensibly in his own name, but in fact for the house, and through the influence, of Delard, Swan & Co. of Paris, for the delivery of from ten to fifteen hundred tons of pot and pearl ashes, *in any port of France*, at 53*l.* sterling per ton, (payable as soon as delivered,) two fifths in bills on Hamburg, and three fifths in *louis d'ors*, with a license of exportation for the specie.

On the nineteenth of the same month, Robert Lyle wrote

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to Clason an account of the contract, urging him to embark in it, and enclosing a more particular letter from Swan, offering Clason an interest in the contract, by the terms of which the profits were to be thus divided : one third to Delard, Swan & Co. and two thirds to Clason, giving to Lyle for the use of his name, a fifth of the whole ; one third of which was to be paid by Delard, Swan & Co. the remaining two thirds by Clason. Robert Lyle, in his letter, cautions Clason against being too explicit in what he may write, for fear of capture, and advises him to let the language he might use accord with the appearance the business might be obliged to assume.

In consequence of this letter, and without any other information of the contract than what the letter of Robert Lyle contained, Clason, in July, 1794, despatched to France, under the command of one Gideon Gardner, a vessel named the Joseph, laden with pot and pearl ashes, giving
 [*325] *to Gardner, at the same time, the following letter of instructions :

New York, 26th July, 1794.

Capt. Gideon Gardner,

Dear Sir,—You will please to take charge of the ship Joseph, and proceed as fast as possible to France. I shall not confine you to *any one port*, but by all means endeavor to get into *any port, the first that you can make*, which, if you are fortunate enough in arriving safe, you will immediately apply to one of our American consuls for instructions respecting the customs of the place, and there make sale of your cargo to the best advantage for my account ; *perhaps you will be able to make a sale of the whole to the Republic of France*, at a good profit, by taking part in brandy ; which, if so, and the brandy should appear to you of a good quality, and at such a price as you might judge would answer to bring here, you will do it ; if not, you will endeavor to sell for cash, and if times should appear favorable in England, you will remit the greater part of your avails to

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Messrs. Bird, Savage & Bird, merchants, in London; and if you don't find freight from France, or any other article that will answer, you may run to any port in England, and either load there with salt, or get freight, whichever you may judge will be most to my interest. However, it is impossible for me to give you any positive instructions, from the precariousness of the times; much will depend on your good judgment on your arrival. I think likely you may see or hear from Robert Lyle, if so, he will give you very essential assistance in your negotiating your business in that country.

I am, sir, &c.

(Signed)

ISAAC CLASON.

Gardner set sail with the Joseph, and, on the 4th September, 1794, arrived at Cherbóurg. From thence he addressed himself to Delard, Swan & Co. and on the 9th of October, 1794, wrote them thus:

*Cherbóurg, 9th October, 1794. [*326]

Messrs. DELARD, SWAN & Co.

Gentlemen,—I received yours this morning of the 15th Vendemaire. I wrote you yesterday and enclosed you a receipt from the *garde magasin* for my cargo. The cost of my cargo I sent you in my letter yours now mentions of receiving; but agreeable to your request, you have it here enclosed. The pot and pearl ashes, as per invoice, cost

12,012l 8s. £12,012 8 0

One barrel ashes delivered more than the invoice, which I received as a barrel of beef, average 350 wt at 46s.

8 1

New York currency, £12,020 4 0

Charges here—paid charterage, 1,000

do. weighing, 25

1,025

I know of no other charges here; if any to be paid to the commission of commerce, you will please to charge them

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in the account. If you recollect, you took off the foots of the invoice, when I was at Paris, on the letter I left with you. The letter I wrote you about my owner you mention of having found it, and say it was enclosed in yours I received this morning, but I expect you omitted it, as it has not come to hand. Please to forward it as soon as possible, as it may make some alteration in my affairs. You mention of the uncertainty of receiving cash or bills for any article from America. I would thank you, in your last to me, to mention whether WE may place full confidence in *their* paying me in good bills, or cash, AGREEABLE TO THE CONTRACT FOR THE QUANTITY OF ASHES SPECIFIED, AS THAT WAS MY PARTICULAR ORDERS FROM MR. CLASON. You have once mentioned it, but your two last letters leave it doubtful in my mind. I would thank you to acquaint Mr. Lyle of my proceedings as soon as the bills are obtained. I am only waiting for the bills, and beg you to make all despatch in your power, and am yours.

(Signed)

GIDEON GARDNER.

On the 7th of December following, Gardner addressed a letter to Lyle in these terms:

Cherbourg, 7th December, 1794.

Dear Sir: I received yours of 15th November. I arrived here 4th September, and *proceeded to Paris and delivered the cargo ON THE CONTRACT OF 53; and as Mr. C. was in advance for the whole, I arranged it for D. S. to have one third, agreeable to the account annexed.* THEY ARE TO SETTLE WITH YOU FOR ONE-THIRD OF WHAT YOU ARE ENTITLED TO, AND MR. C. TO SETTLE WITH YOU TWO-THIRDS, after delivering the cargo, and the receipt presented for payment. There was a suspension of all payments in bills or money. I returned to Paris, and, after a long and tedious detention, I obtained bills on Hamburg, *though not at the rate agreed for.* They are at 90 days, and the exchange 185 livres for 100 marcs banco; which bills I forwarded by post, to Lubert & Dumas, who, I understood, did your business there.

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I was fearful you were in England by what I had heard, or I would have sent them to you. My orders to them were, to negotiate the bills, and remit the money to B., S. & B., London, on Mr. C.'s account, except there should be an appearance of war. In that case they are to consult you. (*I was cautioned by Mr. C. in respect to that.*) I presented a petition for demurrage, &c., to the amount of 250*l.* sterling, which has passed two or three offices, which I wish you to press hard for. I sent two bills by different posts, and wrote you. I have two-thirds of a cargo of prize salt on freight; about 400*l.* sterl. freight. It is almost half on board, and am taking in the rest; shall sail in a few days for New York, and expect to return as fast as possible *with the remainder of the contract.* Swan is gone to America. Mr. C. shipped by Captain S. Armour about two hundred tons; Major Conolly is the supercargo. They have sold to individuals for specie. I have wrote B., S. & B. since I sent the bills, and also informed them of this other cargo.

**Account of my cargo.*

By sales. [*32£]

	<i>l.</i>	<i>s.</i>	<i>d.</i>		<i>l.</i>	<i>s.</i>	<i>d.</i>
To the cost in America,				Of two hundred and six-			
as per invoice,	12,020	4	0	ty-one tons and 286			
Insurance, 5 per cent.	801	0	2	lb. at 53 pounds per			
				ton,	13,840	0	0
	12,621	4	2				
Interest on do. from 1st				The amount of bills I re-			
July to 1st December,				mitted, is M. Banco,	158	786	10
at 6 per cent.	315	10	7				
My commission,	1,000			To this, Delard & Co. added, "Ap-			
Freight, 1,200 sterling,	2,133	6	8	proved this account; the assignats to			
				be settled at ten, and Clason obliged			
New York currency,	16,070	1	5	to satisfy Lyle for two-thirds of his			
				commission or gratification.			
Is, sterling,	8,039	8	4	(Signed) D. S. & Co."			
3,200 7 10							
1,600 3 10—	4,800	11	8				
	13,840	0	0				
Paper-money expenses							
on the cargo was 2,795							
livres, 2-3 1-3.							

In the month of March, 1801, Robert Lyle arrived in New York. Clason refusing to pay the two-thirds of the fifth of the emoluments arising from the contract with the

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French Republic, Robert, in April, 1801, brought the present action against him, shortly after which, Clason arrested Robert and John Lyle in the cross suit, for a very considerable sum of money.

In December, 1801, both causes were, by order of court, referred.

On the 10th of March following, the attorney for Robert Lyle submitted the following proposition to the attorney of Clason.

"As the suit instituted by Mr. Clason against Mr. Lyle, does not include any claim for damages, arising from the misconduct of the latter, and more particularly for damages like those claimed on the business of the Hare, it would be proper (lest these should be made the subject of a future suit on the part of Mr. Clason, on the ground of an objection to the report on the part of Mr. Lyle) that all claims and controversies of this nature be included in the submission already made, which, in a legal point of view, extends only to the subject matter in difference, in the particular suits referred.

(Signed) "THOS. L. OGDEN, for Lyles."

[*329] *To this the attorney of Clason subjoined the following memorandum:

"It is understood that the demands for damages above mentioned, and all claims and demands on both sides, founded on contract, express or implied, are submitted." To this addition the attorneys of both parties added their signatures, and the consents of the litigants themselves were given in these words: "We agree to the above, and that all the accounts, *as already exhibited*, shall be reported on by the referees in these causes.

(Signed)

"I. CLASON,

"ROBT. LYLE."

On the 30th December, the deposition of Gardner was taken in behalf of Clason; in which, among other things, Gardner swore that his letter of instructions contained the

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only orders he had from Clason; that Delard & Co. informed him of *their* contract with the French government, and he contracted with them; that *they* informed him the contract was in Lyle's name, he being a neuter; that *they* informed him Lyle was to have a *gratification*; but what it was, he, Gardiner, *never knew*; thinking, and being fully assured in his own mind, that it would apply to the benefit of Clason, Lyle being his salaried agent, which consideration induced him, Gardner, to consent to Clason's being accountable to Lyle for two-thirds of the said gratification, which he expected would be paid by the salary at which Lyle was retained.

On the 22d of June, the referees made their report in both causes, and in each reported in favor of the defendants.

On the 20th of July, the report in the cross suit by Clason, was, on ~~motion~~ *in court*, duly confirmed. Immediately after which, on the 23d of the same month, Robert Lyle, in order to set aside the report in favor of Clason, made an affidavit, which stated, that the suit instituted by him in April, 1801, was to recover money had and received by Clason to the deponent's use; that it was referred, and at the meeting of the referees, the deponent, as the basis of his claim, did prove, and make **appear*, [*330] &c., (mentioning the contract and circumstances, and letters detailed in the beginning of the case,) that the net profits on the sales made by Gardner under the contract, were 4,800*l.* 11*s.* 8*d.* sterling; that the fifth, to which the deponent was entitled, in pursuance of the engagements made with him, was 960*l.* 2*s.* 4*d.* of which, by an original account of Delard, Swan & Co. produced to the referees, it was proved Delard, Swan & Co. had paid their one-third, according to the agreement with Gardner; but no payment was shown, or pretended to have been made, of the other two-thirds of the fifth, nor was there before the referees any set-off, or counter claim, established against the defendant; that the deposition of Gardner (before shortly stated) was shown to the referees, and Gardner himself personally ex

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amined; that he then testified *he was, previously to his departure from America, with the said cargo in the ship Joseph, made acquainted with the existence of the said contract, BY THE DEFENDANT, and with the terms or price therein stipulated;* that he did not consider himself bound by the instructions of the defendant, to deliver his cargo under the contract, nor restricted from doing so, but at liberty to act according to his discretion; that his motives for inquiring from Delard & Co. respecting the reliance to be placed on punctual payment, and also for alleging this to be done at the desire of the defendant, was to hold out the idea of future shipments, and so insure the payment of what had been delivered, but not settled for; that it was made to appear without any denial, that the defendant had only received his two-thirds of the profit on the contract aforesaid; that the report had, notwithstanding, been made in favor of the plaintiff, under an idea that Gardner had no authority to bind Clason to the payment of anything to the deponent; and that Clason had altered the deposition of Gardner, after it was made, and before presented to the referees, without communicating the alteration to them. On the 6th of October, 1802, Clason made an affidavit to vacate the report in favor of the Lyle, in which he set forth the instituting the two [*331] suits, their being referred; the reports *made in favor of the respective defendants, and that they were duly filed, on the first day of July term last past, so that judgment would, according to the usual course of the court, be absolute the then term; that the reports, according to his information and belief, were drawn up by agreement between the counsel in both suits, that each should draw the report in favor of his own client; that the deponent's attorney was, on the 28d of July last, served with a copy of an affidavit, accompanied with a notice of moving upon it to set aside the report in favor of the deponent; that the matters contained in the affidavit went to the merits of the case, respecting which, on account of sickness in the deponent's family, and absence from New York, the depon-

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ment could not make any explanations to his counsel; that he acquiesced in the report against himself, from a conviction that nothing could be obtained from Lyle, and, therefore, no report could operate more favorably to the interest of the defendant; that the known inability of Lyle to pay, was one reason why the referees were less particular in examining the deponent's claims against him, than they otherwise would have been, deeming it unimportant; that the two reports were made, and intended by the referees, as *set-offs the one against the other*, and to this end, they instructed counsel to prepare them accordingly; that among other charges against Lyle, the deponent gave in evidence an account rendered by Lyle, in which he acknowledged having in his hands a balance of 244,246 livres in assignats, amounting, at the then rate of exchange, to 4,477 dollars, and that assignats were then never kept on hand, but always converted into property, to avoid depreciation; that since the account so rendered, the deponent never had any further money or mercantile transactions with the Lyles, and that Lyle neither accounted for, nor made any set-off against, the said assignats, but the same were totally unaccounted for; that the deponent, as soon as the sickness of his family permitted, consulted respecting measures to be taken about opposing the motion, to set aside the report in Lyle's favor, but there was not time enough left in the term to do it; that but for the application of Lyle to set aside the report in favor of the defendant, he [*382] should not have applied to set aside that in favor of Lyle, for the insolvency of Lyle made it of no consequence.

The notice of motion with which this affidavit was accompanied, was repeated on the 7th of January, 1803.

To oppose this Robert Lyle made, on the 14th of January, 1803, an affidavit, stating, that he and his brother John, the other defendant, acted, in the year 1795, as agents for Clason, in which capacity they had received various large sums of money, the whole of which had been

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faithfully accounted for; that the suit against Clason was for money due individually to the defendant, on another concern, and for damages for libellous letters and slanders published against him by Clason; that he and his brother were arrested, as before mentioned, and the two causes referred; that in the suit against the deponent and his brother, (the declaration on which was for goods sold with the usual money counts only,) Clason produced an account, with charges against the deponent and his brother, for breach of orders and neglect of duty, to a very large amount; that on asking for some evidence, by which it might appear those charges were included in the submission, the agreement of the 10th March, 1802, was produced; that the same was intended merely to extend the powers of the referees to claims of the nature of those mentioned in, and warranted by, the declarations to which the deponent had confined himself; that his and his brother's faithful agency, and due accounting for all sums of money, were fully proved; that in the cross suit against the deponent and his brother, the referees made their report on a conviction nothing was due to Clason, and not from any regard to the deponent's insolvency or circumstances, as he was, by the referees themselves, personally informed; that the deponent proved, to the satisfaction of the referees, that the value of the assignats mentioned in Clason's affidavit, was at the time he specified, only 278*l.* 2*s.* 9*d.*, and not 4,477 dollars; that they were *not* then usually converted into property, but held by many persons in hopes of their rising, and that the said assignats were not only [*333] not made use of by the *deponent, or kept in his hands, BUT HAD, FROM THE TIME OF THEIR FIRST RECEPTION, BEEN PAID OVER BY HIM TO THE CORRESPONDENTS OF *Clason, Lubbert, Freres & Fils*, of *Bordeaux*, BY WHOM THEY WERE CONVERTED INTO SPECIE, FOR THE USE OF Clason, AND ACCOUNTED FOR WITH GARDNER, WHEN ACTING AS Clason's AGENT; that so far from the acquiescence of Clason in the report against him, for the reasons

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he had assigned, he had, after it was made, purchased protested bills, on which the deponent's name was as an endorser, and had commenced suits against the deponent upon them, in order, as he believed, to create a set-off against the verdict the deponent might ultimately obtain.

After some struggle by Hamilton, on the part of Lyle, to discriminate the two suits, the court was pleased to order the arguments to set aside the several reports to come on together.

Hamilton, for Lyle, after stating the circumstances, and commenting on them, and the affidavits of Clason and Gardner, observed that it was very singular Gardner, without any knowledge of the contract of Delard, Swan & Co., with the French Republic, or of Lyle's intent, should deliver exactly under that contract, and write a letter acknowledging the very interest Lyle claimed under it, and that Clason should pay him what he was thus entitled to. Gardner, without knowing the contract, goes further; he asks Delard & Co. if the French government will be punctual in paying, and ~~this~~, he adds, Clason desired him to inquire about. Clason, too, ratifies the engagement of Delard & Co., and Gardner, with Lyle, by adjusting the account with Delard & Co. and receiving under that account the two thirds, by the very express terms of it, charged with the payment of the two thirds of Lyle's fifth. To argue on the assertions of Gardner would be really superfluous. The referees must have thought Gardner had no right to bind Clason. This idea is clearly repugnant to every principle of law. He that intrusts another with general powers, must abide the result of his agent's conduct. Therefore, though the report *in favor of Lyle may, and ought to stand, [*384] that in favor of Clason ought to be set aside.

Hopkins and Troup, contra. In making the reports in these causes, the referees were actuated by a wish to make the parties even, and leave them just as they were found.

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For this purpose, the report in our cause was intended as a set-off to the other, and to effect this object, counsel were desired to frame the reports in such a manner as might best obtain the desired end. The various facts appear in the affidavits before the court; but it is material to state, that the party who first made the application to disturb these reports, has not presented any original agreement on which his suit is founded. Delard, Swan & Co., made a contract with the French government, for a certain quantity of pot and pearl ashes: as these articles enter into the composition of gunpowder, it was necessary to have a neutral name in the business. It is difficult to say what ought to be the true relative compensation for the protection a neutral character would afford; but it is to be observed, that Delard & Co. were the real contractors; Lyle a mere *nominis umbra*: for this, however, he says he is to have one full fifth, one third of it to be paid by Delard, Swan & Co., the other two thirds by Clason. These terms, it is alleged, were stipulated by a formal contract, yet this contract, which Lyle must have had, is never produced; on the contrary, instead of relying upon it, he rests on a letter received from Gardner. In addition to the inference to be drawn from this fact, it appears that at the very time when this pretended contract was made, Lyle was in Europe, under an annual allowance from Clason, and actually his salaried agent, receiving wages for every service performed. A doubt has been entertained, how far the court can, under the existing circumstances, with propriety set aside the report in favor of Clason; but, surely, whenever they clearly perceive that the referees have proceeded on a mistake, either of law or fact, this tribunal will always interfere. If the court will set aside an award, they will, on the same principles, vacate a report: and whatever argument [*335] will induce them to do it in one of the now causes, will have equal force in the other; for if the referees have been mistaken in their endeavors to create mutual set-offs, both reports will be set aside; or, on the other

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hand, if they have acted properly, both will be confirmed, for the court will not, unnecessarily, do away what the referees have done. In making their determination, they considered that the power to sell, and the power to give away profits, were two things: to this latter, it cannot be contended that the authority of an agent or a factor can extend. There is no question about an agent's right over the property passed to him, but he cannot enter into collateral engagements: he may sell and warrant a title; but not give away the property. If he may, in any degree, do this, he may go on indefinitely, and make away with the whole. He may go on making contracts ruinous to his employer, and contrary to the purposes of his delegation. Under a power to sell, if he should be allowed even to exchange, can he be authorized to pay a difference? The boundary of his power to bind, must be connected with that of his authority to sell; it must be confined to that, and will not warrant him to give away profits; to pay another sum of money on another account than that of the sale. The point turns on whether Gardner had a competent authority to bind Olason, to pay two thirds of a fifth of the profits. It was derived from the letter of instructions. That letter delegates only a general power. From the exercise of such a power, the claim cannot be supported. That a factor may sell by a broker, and give a commission, if customary, is not contested; but it is contested, that a factor or agent, having only a general authority to sell, can give away a substantive part of the merchandise when it is sold; that he can do so, there is not a *dictum* in the books. It would be, in fact, to enable him to dispose of a portion of the property he is intrusted to vend. It would give rise to the most serious consequences; a fraudulent collusion would completely destroy the interests of the principal, by enabling to constitute a sale regular in its form, the precise mode of which could not be easily [*336] foreseen. The intention of Olason's agent must be taken into consideration, and the motives on which he

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proceeded permitted to explain how he meant to bind his principal. Gardner never knew what the gratification to be paid Lyle actually was. The inducement he had to consent to any was, that he deemed the amount immaterial; for as Lyle was in the service of Olason, at a fixed salary, Gardner naturally concluded all Lyle's labor would accrue to Olason. On the principles of natural justice, the demand cannot be substantiated. He lends his name to Delard, it being necessary to make use of a neuter. The *douceur* must certainly be according to the situation of the party. The letter to Olason, containing the terms of the contract, does not state the sum to be paid. It is obvious, therefore, that this was never intended. It was considered as too trifling to specify.

Gardner knew, when he left America, that Lyle was a salaried agent. This is not a case of good faith between an agent and a person totally a stranger, and, therefore, the principal called on to pay; but we are called upon, on the strength of a little memorandum touched into the foot of an account. It is not to be forgotten that the referees were merchants, and well knew the course of trade and business when the transactions took place, as well as the rights of an agent at a fixed annual allowance. The claim, too, goes by the express name of a gratification; and who ever heard of a partnership share (which this in fact is) ever being known by the appellation of a gratification? When was 600*L.* sterling ever considered as a gratification for a person at a salary of 150*L.* per annum, New York currency? The referees might, therefore, have justly rejected the claim. No inference can be drawn from Gardner's letter, speaking of a contract: he might have sailed on one very different. But it was not the mere matter of the contract that was referred; subsequent matters were added, not included in the two causes: this was by agreement of the parties, and how can the court say the full claim on the contract [*387] has not been allowed, when it might have been counterbalanced by damages and misconduct in the

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matter of the Hare? This, therefore, being an application to the equitable jurisdiction of the court, they will so mould and blend the two causes as will best answer the ends of justice; and if, in the suit by Lyle, the report be set aside, the court will do it on terms, and vacate the report in that *against* him.

Clason declares he never heard what Lyle's compensation was, till after the suit was brought. But can the court say this particular claim ought not to be disallowed? After the rules to refer, other matters were added and blended; all contracts, "*express or implied*," were submitted. It cannot be said there were not other claims to extinguish this demand of two thirds of the fifth. It might have been admitted and liquidated by a counter claim. Referees and arbitrators may so consider the subject matter before them, as will best answer the ends of justice: they may take into view matters both of law and of fact; perform the offices of judges and jurors, and are entitled to found their decision either on law, or principles of general equity. The whole of this was delegated to them, and they have determined, on a view of all matters in controversy blended together in one mass, all the objects in these two causes, even in that against both the Lyles, as consolidated before them. Whether they have been perfectly accurate in thus beholding them is immaterial, provided they did so consider them, have acted under that idea, and have attained the real ends of justice, though perhaps by extraordinary means. It was evidently the wish of the parties to set all controversies between them fully at rest, and this has been accomplished. The court therefore, will never say that one report shall be confirmed, and the other set aside. The consideration of the report in the suit by Clason, might have influenced in the making up *that* in the action against him. That it did so is evident, because the reports were intended as mutual set-off. Whether this could be supported on strict legal reasoning, has been doubted; but the spirit of

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[*888] *the case in 3 D. & E.(a) might perhaps, fully warrant the conduct of the referees. It may be a question also, how far Gardner could give such an interest, as might, perhaps, create a partnership between Lyle and Clason.

Harrison and Hamilton, in reply: If, in cases of full and fair investigation before juries, this court will interpose, when a verdict has been rendered on an evident mistake of the law, they certainly will do so in the case of a report made by referees, however appointed. That this reasoning applies to the suit of *Lyle v. Clason*, is manifest, and it will, therefore, be sent for further examination. With respect to the contract made between Lyle and Gardner, the agent of Clason, it is for the court to determine whether it be obligatory or not. The affidavits on the part of Clason do not state that he was ignorant of the contract with the French government, but of the claim of Lyle. It appears from Lyle's deposition, and is not controverted, that in March, 1794, letters were written by Lyle and Swan, informing Clason of the contract; of Lyle's right, and that he (Clason) might share if he thought proper. The letters were produced, and that they were received Clason's conscience would not let him negative. There was a stipulation to compensate, with a share of the actual profits, for the use of the neutral name of Lyle; when these profits were ascertained, the right of Lyle attached. There is, to be sure, no express recognition by Clason of the contract, but in the September following the date of Lyle's letter, Gardner arrives in France with exactly such a cargo as the contract demanded. Are there not circumstances enough to think he went there for the purpose of acting under it? But even allowing there are not, does not the letter of instructions substitute Gardner as owner of the property he carried, and invest him with all Clason's power over it?

(a) *Glaister v. Hewer and others*, 3 D. and E. 69, is, it is presumed, the case alluded to; but it seems hardly to bear out the inference.

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He is to exercise his judgment; do his best; sell for French brandy; sell to the French government, &c.; he had, therefore, a right to make any contract under the words of the letter. He arrives in France with a power to dispose; he finds Delard possessed of a contract in the name of Lyle, under which the power to dispose may be *exercised with great advantage. He does exercise [*389] it, receives the emolument, settles with Delard & Co., but refuses to do so with us. The inquiry then is, had Gardner a power, and has he exercised it? That he had, and has, no doubt can be entertained; and as little that it was under our contract; for the affidavit subsequently made by Gardner does not deny, but admits the fact. He says, however, that he knew not what the gratification was. This is extraordinary; he seems to have forgotten his own letter after a very few months; and though *that* does not specify the exact sum, the two thirds for which he mentions Clason is to settle, it affords an internal evidence that he did know it much stronger than his own assertion to the contrary. Gardner's letter of the 7th December, 1794, particularizes two thirds, and gives an account of the sales. Allowing, however, Gardner not to be apprised of the exact sum, as Lyle's right was ascertained and perfected under the contract to which Gardner consented, acceding to the payment of two thirds by Clason, it follows Clason must be bound. The rule is, that he who places confidence shall suffer by the abuse of that confidence; Clason, therefore, and not Lyle, is to be the loser by Gardner's actions. It is extraordinary that Clason should have remained ignorant of the amount of Lyle's claim, four years after Gardner's return and rendering an account of his transactions. If Gardner, then, having an authority to bind Clason, did so, and Clason has received the benefit of that transaction, Lyle's right is perfect. The assertion of his being a salaried agent does not affect the claim. His time of service expired in September. Beyond that, Clason himself allows no salary, and Gardner's letter is dated in December. Gard-

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nor himself acknowledges Lyle's right, by telling Delard to pay one third of it. Had it been otherwise, Gardner would have said "You are not to pay the third of the fifth to Lyle, but to Clason, for whose benefit Lyle is acting." There is a further proof in the letter to Lyle. Gardner there says, "*Mr. Clason is to settle with you for two thirds.*" Here, then, is a clear established right in Lyle to receive from Clason two thirds of the fifth of the [*840] *whole profits. If so, the arbitrators have been guilty of a mistake in point of law, in considering Gardner unauthorized to bind Clason, and this the court will assuredly set right. There is also another ground on which they have clearly erred; for if they have blended the reports in the two causes, or made one enter into the composition of the other, they are manifestly wrong. There is no evidence of anything against Lyle's right, but the demands in the cause against him and his brother. Though both causes were referred, the referees have not any right to blend matter extraneous to the respective suits. Robert Lyle's action is for his own separate account. That of Clason against Robert and John Lyle is against the partnership, and the one cannot be set off against the other, being in different rights. This is very wide from the case of a surviving partner, where the rights and duties centre in one person. The agreement does not alter this, for it was merely to allow of such matters as were admissible against the same parties, though not specifically proceeded for; to settle all disputes for which actions might be instituted against the respective defendants; to allow of damages arising from breach of contracts, express or implied, by the Lyles, to be settled under the reference of the suit against them, in which counts were used not applicable to actions for damages, but never to permit one suit to be set off against the other, or make Robert Lyle give up the benefit of his claim against Clason. They did not even take it into consideration, as they considered it not due; the report therefore, in favor of Robert and John Lyle may well be

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suffered to remain, and that in favor of Clason be set aside, for the amount of the profits claimed from him not being taken into consideration in the accounts by the referees, now remain unsettled. If, therefore, without including this demand, Clason has not any demand against Robert & John Lyle, the report does not prevent Robert from having a demand against Clason. Besides, it is evident the contract must have been known to Clason and Gardner, by the latter's expressing an intention of returning with the residue. The not mentioning it in the letter *of [*341] instructions was to avoid the risk of capture and condemnation: fates that were sure to attend a cargo of a contraband nature, going under an avowed contract with the French government. The receipt by Clason, of the proceeds of the cargo, is a ratification of every contract under which it was made, and no disavowal of Gardner's authority can be permitted. Clason enjoys the benefit, and if any charges do accompany the agreement, it is to be taken *cum onere*. The allowance of the account by Delard, Swan & Co. is conclusive on the terms.

LEWIS, Ch. J., delivered the judgment of the court.

These actions were referred under rules of court to three referees, who have reported in each against the respective plaintiffs, declaring nothing due on either side. Motions are now made to set aside the several awards.

In the first cause, in which Lyle is plaintiff, the application is founded on a presumption that the referees have been mistaken in point of law. That they have either rejected a contract entered into by the defendant's shipmaster and consignee, as not obligatory on his principal, or have set off the balances found for the plaintiffs, in the respective causes against each other.

To this the defendant answers, that he was not bound by the engagement of his shipmaster, who was also his consignee, and that if the referees have made such offset, they

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were justified on principles of law, and by an agreement entered into between the respective attorneys.

[*842] *Captain Gardner's powers being discretionary, he was perfectly justifiable in making the disposition he did of the cargo intrusted to him, and even if he was not, it does not appear that Mr. Clason ever denied that transaction his sanction, but that, on the contrary, he has received, by remittances to Bird, Savage & Bird, of London, the proceeds of the cargo, including his proportion of the profits. Under these circumstances there can be no doubt that Captain Gardner, having turned in his cargo under the contract, bound Mr. Clason to the fulfilment of the terms of that contract; and the latter, having received the full two-thirds of the profits of the adventure, under the stipulation made by his agent, that he should account to Lyle for two-thirds of his *douceur*, or whatever else it may be called, (for names will not alter the essential quality of the thing,) he is bound to perform such stipulation.

If, therefore, the referees have not admitted this claim, they have erred as to the law, and the award ought to be set aside.

If, on the contrary, they have admitted it, then they must have allowed a balance found due to Clason in the other suit, as a set-off against it. This also is incorrect; for the suits are not between the same parties and the

[*843] *partnership funds should have been first appropriated to the discharge of the partnership debts.

The agreement between the attorneys does not authorize such set-off. Its only object is the admission of certain demands which would not fall within any of the counts in the respective declarations, in order to avoid further litigation.

The report, therefore, in each suit, ought, in my opinion, to be set aside. The one against Clason, for the reason above mentioned, and the one in which he is plaintiff, because there is a probability that the referees found a balance there due to him, which he would otherwise lose the benefit

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of. The judgment of the court is, that both reports be set aside.^(a)

Both reports set aside.

BRETT & BUNN *against* HOOD.

If a plaintiff gives notice of motion to set aside a judge's certificate to stay proceedings, and do not attend to argue, the defendant will be allowed costs. In no case will the court hear an argument to set aside a judge's certificate to stay proceedings on a case made, *ut semb.*

THE plaintiffs had, in the last term, recovered a verdict against the defendant, who, on making a case, had obtained the usual certificate to stay proceedings; to set aside which, the plaintiffs gave notice of a motion, but not attending to argue it;

Caines, for the defendant, on the last day of term, applied for costs, which were ORDERED.

N. B. It was, during this term, intimated by the bench, that they would not hear any argument to set aside a judge's certificate to stay proceedings on a case made.[1]

RATHBONE *against* BLACKFORD.

An affidavit of service on a person in an attorney's office, must show that there is a relation between him and the person served.

THE service of a notice in this cause, was stated in the affidavit to have been on a person in the office of the attorney.

(a) See *Combs v. Wyckoff*, ante, 147, and the notes.

[1] But see *Ryckman v. Parkins*, 9 Wend. 470; *Cass v. Turner*, 2 Wend. 627; *Lyon v. Burtes*, 4 Cow. 539.

 Parkman v. Sherman.

Per Curiam. It is not sufficient. There does not appear to be any relation between the party served and the attorney. The notice might have been given to a mere stranger. A connection ought, therefore, to have been stated, so that the court might be convinced of a privity between the party to whom the notice is delivered, and the attorney on whom it is meant to take effect. See *ante*, p. 78.[1]

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*PARKMAN *against* SHERMAN.

When the notice and all the papers are titled *versus* instead of *ad sectionem*, it is fatal.

THE Court, in this cause, determined that when both notice and affidavit are wrong titled by reversing the parties and putting the defendant in the place of the plaintiff, the error is fatal; and this case was distinguished from that of *Ryers v. Hillyer*, (*ante*, 112,) because there, though the parties were reversed in the title of the notice, yet in that of the affidavit they were rightly named; so that, independent of the object of the notice in *that* suit, there was a proper title to rectify the mistake; but in this, where, in every paper the action was as if by the defendant against the plaintiff, there was not anything by which the mistake could be cleared up, and the notice might, therefore, be in a cross suit, where the parties actually were reversed.[2]

[1] See also Code of Procedure, sec. 409.

[2] See 2 Cow. 581; 1 Wend. 22; 11 Wend. 178; 3 Caines, 140 4 Cow 60; Code of Procedure, sec. 406

Milward v. Hallett.

MILWARD against HALLETT.

Amendments to a case made must be contained in the case served, or refer to the line and page in which it is proposed to amend. The party served cannot draw up a new case.

THE plaintiff had recovered a verdict against the defendant, on whose part a case had been made, and a copy served on the attorney of the plaintiff. Many inaccuracies being observed in it, a full statement was drawn up on the part of the plaintiff, and served on the defendant's attorney, who, on receipt of it, objected to the informality of thus making a new case. The usual time for objecting to the amendments having elapsed, the attorney of the plaintiff gave notice of argument, set the cause down for hearing, and served copies of the cases he had drawn up:

Quines, on an affidavit, to which was annexed a copy of the altered case, made on the part of the plaintiff, and also a copy of the service of notice, moved to bring on the argument, or that the plaintiff have leave to enter up his judgment.

Benson, contra, resisted the application, contending that the case now before the court was a new, and not an amended case. (*Hun and others v. Bowne*, ante, 23.) That the rule allowing amendments to be proposed, did not authorize making an entire new case, like that on which it was wished to proceed.

**Quines*, in reply, hoped the court would not [*345] hearken to a distinction which really did not seem to have any solidity. Every case differing from that first served, was in fact an altered or amended case. The objection resolved itself into this, that every amendment must be written on the same piece of paper which held the case serv-

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ed. If so, close lines, narrow margins, and great omissions, would render every case superior to amendment, and totally exclude all that the party who made it might please to reject. It was, however, conceived, every variation noticed, though on a separate piece of paper, was as much an amendment as if the diversity had been marked on the paper containing the case originally made.

Per Curiam. Every amendment must be on the case made or refer to the line and page in which it is proposed to be inserted. This, not because it is less an amendment when written on a separate piece of paper, but in order to inform the judge, before whom the cause was tried, where to direct his attention, in case the facts should be disputed, and not reduce him to the necessity of reading over and comparing two cases.[1] The plaintiff can take nothing by his motion.

Motion denied.

 NICHOL and THOMPSON against THE COLUMBIAN INSURANCE COMPANY OF NEW YORK.(a)

If a witness under a commission disclose a collateral fact to which the inquiry was not directed, a second commission may issue to examine as to that fact.

EMOTT moved for a second commission in this cause, to re-examine the same witnesses to a particular fact disclosed, and from which, as the answers then stood, it might be supposed a deviation had been made, to which point the former investigation was not directed.

[1] See *Eagle v. Abner*, 1 J. C. 332. But see *Graham's Pr.*, 2d ed. 352.

(a) *Livingston v. Delafield*, ante, 6, n. (a); *Brady v. Bodolphe & Gibson*, ante, 74.

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Benson, contra.* It is now too late; there was never an instance of a second commission to examine the same witnesses. The answer shows the defence that arises on the return, and this is an attempt to do it away.

Emott, in reply. The application may be novel, but it is not unreasonable. Suppose the witness had been examined in court, and had testified to a certain fact which, taken without any explanation, would, have one effect, if explained, another; might not a question be asked to *explain? especially when it comes out collaterally. Here the deviation was not the object of inquiry. The question was simply, to and from what places were you bound? There may be an apparent, though not real deviation; for there might be a custom to go that route.

Per Curiam. Take your commission. The answer being directed to another point, may be explained by an interrogatory to the one which it discloses; for it may assign very sufficient reasons for the *iter* adopted.[1] The commission, however, must be at the peril of the party.

Rule granted.

[1] See *Fisher v. Dak*, 17 J. R. 343

Ex parte Caskaden.

EX PARTE CASKADEN.

No interest allowed to run on a judgment against a prisoner in execution, to impede his discharge under the insolvent law.

PER CURIAM. A prisoner is entitled to relief under the insolvent law, if the amount with which he stands charged be under that limited by the act, though it would be above the sum specified, if the interest was added; for in the computation, interest on judgments against him is not to be computed.

END OF AUGUST TERM.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW YORK,

IN NOVEMBER TERM, IN THE TWENTY-EIGHTH YEAR OF OUR INDEPENDENCE.

HOPKINS *against* BEEDLE.

An action is not maintainable for saying one is forsworn; *aliter*, that he is perjured. In an action for words, if those in some counts be actionable, and those in others not, and entire damages may be given, judgment will be arrested. But if the plaintiff apply, he may, on payment of costs, have a *venire de novo*.

THIS was an action for words spoken of the plaintiff in the discharge of his duty as an overseer of highways in the county of Cayuga.

In the 1st count, the charge was for saying, "You have sworn to a lie, and I will prove it."

In the 2d, "You have sworn to a lie."

In the 3d, "You have perjured yourself as one of the overseers of the town of Washington, and I can prove it."

The jury having found generally for the plaintiff, a motion was now made by the defendant, for an arrest of judgment, on the following grounds:

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1. That the words in the first and second counts were not in themselves actionable, and no special damage was alleged.

[*348] *2. That it was not alleged in the first and second counts, that the lie, declared by the defendant to have been sworn to by the plaintiff, had been sworn to, or any oath had been taken by the plaintiff, touching the same, in any court of justice, or before any person having competent authority to administer an oath or oaths by the laws of this state.

3. That the charge of perjury, alleged in the third count to have been imputed by the defendant to the plaintiff, cannot, by the laws of this state, amount to a charge of perjury, the same necessarily being a charge of violating the promissory oath taken by the plaintiff as one of the overseers of highways of the town of Washington, in the county of Cayuga aforesaid.

4. That the verdict was general, and that the first and second counts being obviously vitious, judgment could not be rendered for the said plaintiff, for which causes, and for others apparent on the declaration, the defendant insisted the judgment ought to be arrested.

The case being submitted without argument, the opinion of the court was now delivered by

KENT, J. This is a motion in arrest of judgment. The verdict was general. It is urged on the part of the defendant, that the words in the first and second counts are not actionable,^(a) and that it is not alleged that any oath was

(a) Actions of slander are of two kinds; first, where the words are actionable in themselves; secondly, where they become so in consequence of some special damage which they have induced. On a review of the English authorities, it would seem that all those words fall within the first division, which impute to the plaintiff treason, (*Charter v. Peter*, Cro. Eliz. 602; *Hins v. Prinn*, 2 Salk. 696,) felony, (*Cooper v. Smith*, 1 Roll. Abr. 77; *Jones v. Herne*, 2 Wils. 87, overruling 3 Leon. 231,) or a liability to personal or other punishment (1 Roll. Abr. 37,) for any offence of moral turpitude, whether by indictment or otherwise, by the common law, statute law, or custom, *Mayne*

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taken by the plaintiff before any person competent to administer it. It is further urged, that the charge in

v. Digle, 1 Freem. 46.; *Walden v. Mitchell*, 2 Vent. 266.; *Hassell v. Cooper*, 1 Roll. Abr. 36.; *Watson v. Clarke*, Comb. 138. The words must, says Lord Chief Justice De Grey, "contain an express imputation of some crime liable to punishment, some capital offence, or other infamous crime or misdemeanor." *Onslow v. Horne*, 3 Wils. 186. We have narrowed the rule by requiring the charge to be such as "will subject the party to an indictment for a crime involving moral turpitude, or to an infamous punishment." *Brooker v. Coffin*, 5 Johns. Rep. 188. Therefore, as perjury is an indictable offence, involving moral turpitude, and can be committed only by false swearing in a court, or before a magistrate having authority competent to the administration of an oath, to say that another "is perjured" is actionable, (*Green v. Long*, 2 Caines Rep. 91; *Ward v. Clark*, 2 Johns. Rep. 10,) *aliter*, that he was "forsworn," though it be added "in 'squire A.'s court," unless it be shown that A had authority to hold a court, (*Stafford v. Green*, 1 Johns. Rep. 505,) or that he was forsworn before Justice A. though it would have been otherwise had it been said "before a justice of peace." *Gurneth v. Derry*, 3 Lev. 161. Words are also actionable in themselves when they convey a charge of having some contagious distemper then existing; (*Chrslake v. Mapledorum*, 3 D. & E. 473;) *aliter*, that the plaintiff *formerly* had such a disease. *Taylor v. Hall*, 2 Str. 1189. So where they impute to a public officer anything which would disgrace him in his office, and render him unfit for its duties; (*Dole v. Van Rensselaer*, 1 Johns. Cases. 330; *Lindsey v. Smith*, 7 Johns. Rep. 359;) or a tradesman with want of honesty, as that he keeps false books; (*Backus v. Richardson*, 5 Johns. Rep. 476;) or to a professional man, whether in the law or other branch of science, total or general ignorance in his calling; *aliter* if only in a particular matter or cause. *Flete v. Brown*, 8 Johns. Rep. 64.

It is necessary that the words by which the actionable charge is made should be plain and unequivocal; (*Harrison v. Stratton*, 4 Esp. Rep. 218;) they should allege, not merely an intention, but a fact perpetrated, though the imputation need not be in direct terms; it is sufficient if, in common acceptance, the words amount to a charge; as "I have reason to believe," (*Miller v. T. Miller*, 8 Johns. Rep. 77,) the plaintiff "is under a charge for perjury, and the attorney-general has given directions to have him prosecuted for perjury." *Roberts v. Camden*, 9 East, 93. So to say to a witness whilst giving his evidence in court, "that is false," (*M'Loughry v. Wetmore*, 8 Johns. Rep. 82,) or of any one that "he has sworn to a lie for which he stands indicted." *Pelton v. Ward*, 3 Caines' Rep. 73. But words actionable in themselves cease to be so if spoken in confidence, or in answer to inquiries made for security; (*King v. Waring et Ux.*, 5 Esp. Rep. 14; *Weatherston v. Hawkins*, 1 D. & E. 110; *M'Dougall v. Claridge*, 1 Campb. 267;) or if between members of the same church in their course of religious discipline; (*Jarvis v. Hatheway*, 2 Johns. Rep. 180;) or in preferring a complaint before a ma-

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[*849] the third count relates only to the promissory oath of office, for which an indictment for perjury will not lie.

We are of opinion, that the objection to the first and

gistrate, or in giving in charge of a constable; (*Johnson v. Evans*, 3 Esp. Rep. 32; *Leigh v. Webb*, ib. 165;) or in stating a report of a law case, *Curry v. Waller*, 1 Esp. Rep. 456; *Lake v. King*, 1 Saund. 132,) whether the court has jurisdiction or not. *Gwynne v. Pool*, 2 Lutw. 1571, edition by Nelson, 290. So where the words, though *prima facie* importing a felony, are used in a different sense, (*Thompson v. Barnard*, 1 Campb. 48,) or from the context show they cannot expose to indictment or criminal punishment, (*Van Rensselaer v. Dole*, 1 Johns. Cases, 279,) as, he is a felonious thief, he has stolen my apples off my trees.

It has been ruled that an action for words conveying a charge of murder cannot be maintained without averring the person alleged to have been killed to be actually dead; (*Philips v. Kingston*, 1 Vent. 117;) but the contrary has been since determined, (*Talbot v. Case*, Cro. Eliz. 823; *Waterman v. Say*, cited 1 And. 121; *Rivers v. Lile*, 2 Str. 1130,) for unless the contrary appear in the declaration, it will be intended: and as falsity and malice are the gist of the suit, the old cases on this point do not seem to be supportable according to the principles of the action: which, though the plaintiff has been acquitted of the murder, permit the defendant, under a plea of justification, to go into the truth of the charge. *England v. Bourke*, 3 Esp. Rep. 80.

Where the words are not actionable in themselves, special damage must be alleged; therefore, charging another with adultery affords no cause of action without showing some immediately consequential injury sustained through, or by, the assertion; (*Buys and Wife v. Gillespie*, 2 Johns. Rep. 115;) which injury must be the legal result of the words; that is, the effect of something lawfully done in consequence of them, and not any tortious act; (*Vicars v. Wilcox*, 8 East, 1;) because, for such acts, the law gives specific redress. In slander of title the special damage sustained must be set forth; not merely that the plaintiff has lost the sale of his land. *Lowee v. Harewood*, W. Jones, 196. The evidence, in an action for words, need not be of the very words spoken; it is sufficient to prove their substance. *Miller v. M. Miller*, 8 Johns. Rep. 74. But if they be spoken of the plaintiff in his office as a magistrate, they must be so alleged; (*Dole v. Van Rensselaer*, 1 Johns. Cases, 330;) for it is not enough barely to state that the plaintiff was a magistrate. Where there are some good counts and some bad, upon which a general verdict is given, if the judge before whom the cause was tried, certify that the evidence applied only to the good counts, the plaintiff may, upon payment of costs, enter his judgment on them: *Stafford v. Green*, 1 Johns. Rep. 505; see Com. Dig., tit. Action on the case for Defamation; Bac. Abr., tit. Slander; *Gilbert v. Field*, 3 Caines' Rep. 329, and notes there.

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second count is well taken. Swearing to a lie does not necessarily imply that the party has, in judgment of law perjured himself. It may mean that he has sworn to a falsehood without being conscious, at the time, that it was a falsehood. Actionable words are those that convey the charge of perjury in a clear unequivocal manner, and which admit of no uncertainty. The charge is defective in not stating any court or competent officer, before whom the plaintiff swore. Com. Dig. tit. action on the Case for Defamation, F. 5, F. 18; 1 Roll. Abt. 39, n. 40. It may mean extrajudicial swearing; and, therefore, it is held, that a charge that one is *forsworn*, is not actionable; because it shall not be intended in a case where perjury may be committed. [1] On the other hand, a charge that one is *perjured*, is actionable; for that implies the direct legal crime.

With respect to the third count, we are of opinion, that it is sufficient to sustain an action; but as the verdict is general, the judgment must be arrested; the plaintiff, however, on application, might have been entitled to a *verdict de novo*, on payment of costs. (a)

Judgment arrested.

MILLER against LIVINGSTON.

Where commissions are allowed to a captain on his sales and investments, this will not entitle to them on goods he carries, to deliver according to a contract antecedently made by his employer, and for which he does not receive payment. Copies of letters, &c., remaining in a foreign court of admiralty, and duly authenticated under the seal of the court, when returned to a commissioner issued from this court, may be read in evidence.

THIS was an action of *assumpsit*, brought by the plaintiff

[1] See also *Abbott v. Vanderboegh*, 8 Cow. 513; *Adams v. Lowell*, 8 W. 2nd. 573; *Nixon v. Munn*, 13 J. R. 48; *Chapman v. Smith*, 13 Id. 80.

(a) *Anger v. Whitely*, Barlow, 178; *Smith v. Howard*, Id. 480; S. P. See per Buller, J., in *Edwards v. Hopkins*, Doug. 377; see also *Grant v. Ash*, Doug. 722. See also, ante, p. 107, note [1].

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as the factor of the defendant, for the amount of his commissions on selling a quantity of leather.

The cause was tried before Mr. Justice Kent, at the New York circuit, in March, 1801, when the following facts were given in evidence.

That in January, 1795, the plaintiff sailed, in the character of master and supercargo of the ship *Somerset*, belonging to the defendant, on a voyage from New York to Bordeaux, in France. The vessel was laden with a very valuable cargo, consisting of a variety of articles, besides a quantity of leather, which the defendant had, in an engagement entered into between him and the minister *of the French Republic in the United States, agreed to deliver to the French government. By the terms of the contract, the leather was to be paid for on delivery, and if not, the minister bound himself that it should be paid for at the treasury of the United States, out of the debt due to the French Republic. In March following, the plaintiff arrived at Bordeaux, and after encountering some difficulties, delivered the leather, which not being then paid for, the plaintiff, according to his orders, made a regular protest against the French Republic, completed the sale of the residue of his cargo, and invested the proceeds in another, with which he set sail for New York; but in the course of his voyage was captured and carried into Bermuda, where vessel and cargo were condemned by the *vice-admiralty court* of that island. All the papers relating to the outward cargo being on board, were according to the custom of the admiralty in matters of prize, lodged in the registry of the court. To prove, therefore, his letters of instructions, and authorities under which he acted in the disposal of the leather, the plaintiff offered in evidence the deposition of the registrar of the *vice-admiralty court*, annexing, under its seal, authenticated copies(a) of all original letters and papers

(a) The rule of evidence as to copies, is laid down by Lord Holt, in *Lynch v. Clarke*, 3 Salk. 154, to be this: "Wherever the original is of a public nature, and would be evidence if produced, an immediate sworn copy is

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found on board the Somerset, together with a full copy of the proceedings against her and her cargo.

To the reading of these, the defendant's counsel made objections, which were overruled, and they were accordingly received.

From these it appeared that the defendant, in his first letter of instructions, dated the 3d of January, 1796, says, "You have the invoice and other papers that respect the cargo now on board the ship Somerset, and which goes consigned to your address. The commissions upon the sales and investments will be 2 1-2 per cent." He then proceeds to direct the conduct the plaintiff was to pursue in delivering the leather, and how he was to manage in order to obtain payment, but no authority whatsoever was given to sell.

In a subsequent letter, dated the 8d of March, 1796, the defendant says, "I have the original of a private nature, a copy is not evidence unless the original is lost, or burnt." See *The Queen v. Sutton*, 10 Mod. 74. This rule, as to originals of a public nature, is not confined to records; therefore, the copy of a Bank of England bill, remaining on file, is good evidence. *Mann v. Carey*, 2 Bell. 155. It would seem that journals of congress, corporation books, parish register, transfer books of companies, and other papers, which savor more of a private than a public nature, as not appertaining to the community at large, when deposited or kept in some particular place from whence it would be inconvenient to remove them, and under special custody, come within the principle which governs copies of originals of a public nature. *The King v. Lord George Gordon*, Doug. 593, note (3). A copy of a deposition sworn at a judge's chambers, delivered out by his clerk, and attested by his signature is good evidence without proof of an examination with the original; (*Duncan v. Scott*, 1 Camb. 101; see also *M'Neil v. Richards*, 1 Esp. Rep. 263;) and an examined copy of an affidavit on file, in which perjury was committed, is evidence to prove it, without adducing the commissioner before whom sworn, or proving his handwriting. *The King v. James*, Carth. 220. A court of vice admiralty is a court of acknowledged jurisdiction by all countries, and all nations act, or assume to act, under the law by which it is constituted; for this reason, and arguments to be deduced from the *vis major*, as well as *ad inconvenienti*, the evidence offered in the text may well be supposed *omni exceptione major*. To prove an examined copy of a record, it is sufficient for a witness to swear that he examined it while another read the record. *Reid v. Margison*, 1 Campb. 469; *Giles v. Buz*, ib. 471; *Lynde v. Judd*, 1 Esp. Rep. 264, by Day, note (1); S. P.

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[251]. 1795, the defendant says, "If you find that you cannot get your money for the leather, agreeable to contract, and you can sell at near the price it will be best so to do."

In the transaction of the ship's business at Bordeaux, the plaintiff employed under him the house of Barton, Casson & Barton, at a commission of 2 1/2 per cent. out of the commission of 5 per cent. allowed him by the defendant; but they charged no commission on the leather. It appeared also in evidence, that the whole amount on which a commission was charged, was 59,415 dollars; that the captain's wages were only 50 dollars per month, though masters for such voyages usually then received 50 dollars a month; and that the plaintiff had signed a receipt in full, at the foot of an account in which commissions for the leather had been charged, for the balance claimed by him from the defendant, after deducting the commissions now demanded; but the words "in full" were written, with a line drawn through them.

Under these circumstances, the jury found for the plaintiff the amount of the commissions claimed by him, being 2 1/2 per cent. on the invoice cost of the leather delivered, subject to the opinion of the court, whether he was entitled to any commissions, and at what rate, according to which, the verdict was either to stand or be diminished; but if the court should determine that no commissions were due, then judgment to be entered for the defendant.

.. *Hamilton*, for the plaintiff. The principal question is, whether the plaintiff is entitled to a commission on the leather? There is another supplementary point, as to the admissibility of the evidence of the admiralty proceedings, from whence we derive the testimony of the defendant's letter. The right to the commission will depend on the construction of the defendant's letter. By that, the cargo is consigned to him. There is a little apparent ambiguity relating to the two and a half per cent. whether to be taken

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on the sales and investments distributively or copulatively? But on this there is no actual difference of opinion, for the counsel on the other side agreed to the *dis- [*352] tributive acceptation of the words, with this only exception of bills and money. The dispute now is as to the leather. On the latter there can be no doubt. The circumstances of the case show there cannot be a different construction. The plaintiff was consignee of the whole cargo. The mere being a consignee, according to mercantile law, entitles to commissions; for commission is incident to consignment. He was to have a commission on the sales. The leather was *only contracted for* here. That contract and the sale in consequence of it were both consummated by the delivery which the plaintiff had to perform. All writers distinguish contracts from sales. The latter are perfected only by payment, or delivery; and this last the plaintiff had to perform, under a load of discretionary power, which he had to exercise, in weighing or delivering, as circumstances might require: besides, he had an alternative power to sell, or deliver; he was, therefore, agent and consignee. The defendant, it is understood, relies on the contract and sale of the leather being *here*; therefore, being the effect of his own labor and exertions, that the plaintiff, in this respect, was a mere captain, and cannot claim any commission. This has been already confuted; the trouble the plaintiff was to have is stated in the letter of the defendant, and it is not presumable that he was to have it for nothing; especially as his situation charged him with a responsibility, which the court can never suppose to be gratuitously undertaken. As general consignee of the whole cargo, commission on all must be implied.

On the admissibility of the proceedings, the court will observe, that papers often gain respect in consequence of the situation where found. Old papers with wills, &c. are not accredited merely from their antiquity. There can be no doubt that sentences in the admiralty, for the purpose of establishing any fact they contain, and all the proceed-

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ings incident, are *prima facie* evidence. The question now is, whether proceedings relating to the subject of controversy shall be received, when that subject was not the matter before the court there: If decided against the [*353] plaintiff, it will only turn *him round to a court of equity, which the court certainly will not do. The objection to the admission is the want of proof of the hand-writing of the defendant. The court will remember there has been a notice to produce the original; that the letter in question has every circumstance to make it believed a fair and regular document; it was the guide of the plaintiff's conduct, and has been forcibly taken from him; it was against his consent, and without his concurrence, that it was placed in the archives of the court of admiralty, where it is irrevocably fixed, from whence it can never be removed: it is adduced only as *prima facie* evidence; therefore, the defendant was at liberty to rebut its contents. In our own courts a copy thus authenticated would be good evidence, and the almost impossibility of sending a person to authenticate by inspection, is an argument, from the excessive inconvenience, why the evidence should be received. No one can disbelieve the fact. The only difficulty is the technical one, of establishing the hand-writing; but, in the present case, the document ought, abstracted from the rule of law, to have its weight.

Hoffman and E. Livingston, contra. First, as to the admissibility of the testimony. The court must depart from every rule before they can be inclined to admit it. Suppose the letter itself had come into court, and been produced, would that have been enough to have it read before a jury? Must not the hand-writing, the execution, as it might be called, have been first established? Waiving, therefore technical reasoning, shall a letter read in the court of admiralty, and made an exhibit there, become, in this circuitous mode, evidence here, where the letter itself, *the very exhibit*, would not be testimony? A plaintiff cannot, by

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merely producing a paper, make it evidence for him. But the argument is, that if he will first exhibit it in a foreign court of admiralty, the copy shall be better than the original. The difficulties and inconveniences arise, as they ever will, in consequence of departing from established rules, and is not an admissible argument. The law points out a mode, a bill in equity. In the admiralty no proof is made *of the genuineness of the letter, (a) nothing but a [*354] mere naked possession. But even admitting it, the case itself, when plainly stated, solves every difficulty. The leather was only to be *delivered in France*, not *sold*; that business was done here. The plaintiff filled two characters, and each consistent; he was to deliver the leather as master; in this capacity he was a mere carrier, the residue of the cargo he was to sell; and here he was consignee; to receive the commission of 2 1-2 per cent. on sales and investments, distributively. The question is, was the leather sold by him? If so, he is to be paid a commission; if not so sold, he is not entitled to any. He must, according to the counsel's own position, contract and deliver to make a sale. The plaintiff only *delivered*; then, on the principles relied on, he did not *sell*. If paid for in France, 2 1-2 per cent. commission was to be allowed. It is not now paid for, and the plaintiff cannot, on the leather, claim a commission. It can be put in no other shape. The delivery, therefore, was all the plaintiff performed, as to the leather; that was in the line of his duty as captain, and for *that* he has his wages. These very commissions were charged and relinquished. In the account which makes a part of the case, they were claimed, but on being objected to, were stricken out, and a receipt given for the balance without them.

Commissions are claimed by the words of the letter of directions; if, then, they are not plain, explicit, and bear-

(a) A copy of a note of hand refused to be read, there being no proof that the original note was genuine. *Goodier v. Lake*, 1 Atk. 443. N. B. The rules of evidence are the same in equity as at law.

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ing the fullest proof, they are not to be allowed. One must be ignorant of the English language if they ought; the words are "the commissions upon the *sales* and *investments*." Was there a sale? Was there a receipt of money or bills? Was there an investment? In these three cases, commissions were to be allowed, not otherwise. But the qualification of consignee confers, it is said, wonderful rights; that the mere character implies a title to commissions. Consignment alone gives no commissions; it is complying with that consignment, and the conditions on which made. Commission is the child of sale; (a) the result of benefit [*355] fit to the parties, not the mere placing in the hands of another, when nothing is done; still less when what is done is contrary to orders. The instructions are, "to be delivered, their *paying you on delivery*." Non-obedience of this positive order is an answer to the claim of commission. The contract being in the alternative, for payment here or in France, is nothing to the purpose. The defendant was to decide on the place, and he chose it to be at that of delivery, and on delivery only. That the wages were less than ordinarily given, was the natural and reasonable consequence of circumstances. The plaintiff was made consignee of the cargo, and had he obeyed his instructions, by receiving payment on delivery of the leather, and investing the proceeds for an India voyage, as was contemplated, his emoluments would have been excessive. He has acted in contradiction to his orders, and, therefore, instead of commissions, is liable to responsibilities. As to the evidence, it may be procured in another way.

Hamilton, in reply. It will be necessary to add only one or two observations to the reasons for admitting this testimony. It is not asked to be received as conclusive, but only as *prima facie* evidence, subject to be rebutted. It,

(a) Or purchase. *Beaves*, 45.

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therefore, is not put on the same footing as a letter with the hand-writing, or execution, as it has been termed, fully established; in this last case it would be final. The determination of the court is of immense importance; but they will recollect that the original letter was not *voluntarily* brought into a court to forward the interest of the party adducing it. The question is, whether an agent on the sea, in the prosecution of his business, in possession of all the papers and documents necessary to establish his agency, and claims, shall not, when despoiled of them, give a copy from a court of admiralty, where they are deposited, in testimony, as *prima facie* evidence? for it is confined to that. The circumstances with which the proposition is qualified, the court will please to observe, take away all idea of fabricating papers to make use of them as testimony. Then will the court turn us round to a bill in equity? We deny that the plaintiff was to deliver only; he was to exercise discretion, and that takes him out of the [*356] line of a mere carrier. The bill of lading is filled up to him as consignee; he had even a power to sell the leather on certain events, and his character of captain did not necessarily destroy or merge that of consignee. The prospects and hopes of a secondary voyage, we contend, the court cannot infer as a consideration. It does not appear; a mere chance cannot, by intendment of law, become a consideration for meritorious services, when there is a written contract. The captain could not be a mere carrier; for if he had been so, delivery to him would have been delivery to the French Republic, and he could have no power to withhold. On the receipt, it is necessary only to state that it was first written "in full:"(a) so it stood when the

..(a) In Westminster Hall a receipt is only *prima facie* evidence; and, if joint, it may be shown that the money was received by one only of the parties by whom it is signed. *Stratton v. Rastall*, 2 D. & E. 366. But where is full of all demands, and given with a complete knowledge of all circumstances, Lord Kenyon held it to be a conclusive bar, and that a person should not be at liberty to rip up a transaction that he had so closed. *Bristow v*

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make a different disposition of the cargo than his former instructions would warrant, and he had accordingly done so, it might, perhaps, have afforded a ground for a claim of commissions, or an action on a *quantum meruit* for such services; or if he had received the money from the French government, and invested it according to his first instructions, he might have been entitled to his commissions on such investments. But all this is completely answered by showing that he made no sale or other disposition of the leather, but barely delivered it to the French government, pursuant to the first directions of the defendant. The opinion of the court, therefore, is, the plaintiff was only entitled to commissions on the *sales and investments* of the cargo; that here has been no sale or investment of the leather, but only a delivery of it to the French government, according to the defendant's contract with their minister, and, of course, no commissions due him; and that judgment ought to be for the defendant.

Judgment for the defendant.

 JACKSON ex dem. PUTNAM and others, against BOWEN.

Parol testimony cannot be received to show that a deed, stating a course for 36 chains, was intended to express 29.(a) An adverse *pedis possessio* for 20 years and upwards, with a claim of title in other lands, in right of that *pedis possessio*, which lands are part of the lot on which the *pedis possessio* is taken, is a bar to a recovery in ejectment.

EJECTMENT for lands situated in Johnstown, in the county of Montgomery, tried there at the last circuit, before Mr. Justice Thompson.

(a) There is not any rule more universally acknowledged than that by which it is laid down, that parol evidence shall not be given to control or to contradict, to enlarge or to abridge, any instrument in writing, though it may be adduced to explain; and there is scarcely any which, in its application.

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The lessors of the plaintiff, and the defendant also, derived their titles under the will of Victor Putnam, their grandfather. He had devised in severalty, 100 acres of undivided

has created more discussion. On the first branch of the rule it has been decided, that where an ambiguity is patent, arising on the face of the writing; that is, from the very words made use of, parol testimony shall be excluded; as whether "he or they" shall refer to the next antecedent only, or to all preceding; (*Cheney's Case*, 5 Rep. 68;) or the word "woods," in a particular of an estate, cover "underwoods." *Jenkinson v. Pepys*, 6 Ves. jun. 330. So where the testimony would go to destroy the conclusion of law on a will or deed; as on a devise or deed void in law for uncertainty, to show who or what was meant; (*Cheney's Case*, *ubi sup.*;) or that another person than the one named was intended, when there is a person of the name mentioned; (*Debmars v. Robello*, 1 Ves. jun. 412;) or that an agreement for a lease which did not mention any term, meant, from an advertisement to which it did not refer, a lease for lives. *Clinan v. Cooke*, 1 Sch. & Lef. 22. So if it be to destroy the legal operation or construction of a deed or other instrument; as that by "heirs" was meant "heirs of the body;" (*Altham's Case*, 8 Rep. 155;) or that a note having no time of payment expressed, was not payable immediately; (*Thompson v. Kelcham*, 8 Johns. Rep. 189;) or when, without a place of payment, that it is payable in another place than that from whence dated; (*ib. ibid.*, overruling, in this respect, the same case, 4 Johns. Rep. 235;) or from the declarations of a testator, that a will was made by duress; (*Jackson v. Kniffen*, 2 Johns. Rep. 31;) or to give, from usage, a construction to, or explanation of, the language of a grant or deed not ambiguous or equivocal. *Cortelyou v. Van Brunt*, 2 Johns. Rep. 357.

Under the second branch of the rule it has been determined, that parol evidence cannot be admitted to show that particular lands, embraced by a written contract for a lease, were agreed to be accepted out of the lease; (*Lawson v. Laude*, 1 Dick. 346; *Full v. Chamberlain*, 2 Dick. 484;) or that an annuity not redeemable by the grant, was agreed to be so; (*Hare v. Sherwood*, 1 Ves. jun. 24;) or that an absolute bond was given as an indemnity; (*Mease v. Meuse*, Cowp. 47;) or that there is a mistake in a writ or written instrument; (*Fitzlugh v. Runyon*, 8 Johns. Rep. 376;) or that an auctioneer had sold, subject to a charge, when his printed conditions were, "free of all incumbrances." *Gunnis v. Erhart*, 1 H. Bl. 289. Under the third branch it has been held, that parol testimony is inadmissible to prove that a bond given to secure a sum in trust for a wife, was intended to be in bar of dower; (*Timney v. Timney*, 3 Atk. 8;) or from conversations before and at the time of signing an agreement for a lease, at a certain sum, that it was to be clear of taxes; (*Rich v. Jackson*, 4 Bro. Ch. Cas. 513;) or to supply, even in equity, any defect in an agreement under the statute of frauds; (*Binsted v. Coleman*, Bunb. 65;) or to prove that a ground rent is to be paid by a tenant, in addition to the sum mentioned as the rent in his lease; (*Preston v. Morceau*, 2

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land to each of his children, and the overplus to be divided among his four sons.

Johannes, the father of the lessors of the plaintiff was one

Bl. 1248;) or to show that an agreement in writing to exchange a copper-mill for the grass of Whiteacre, was intended to give that of Blackacre also; (*Meers v. Ansell*, 3 Wils. 275;) or (when there are circumstances of fraud) that besides the money consideration expressed in a deed, there were others of name and blood; (*Clarkson v. Hanway*, 2 P. Wms. 258;) or in addition to a valuable as well as good consideration of love and affection, there was a further consideration; (*Schermerhorn v. Vaderheyden*, 1 Johns. Rep. 159;) or from circumstances, that the sum expressed in a receipt of 25 years old, was for continental money, and, therefore, amounted to less than the value stated; (*Roberts and others v. Garnie*, 3 Caines' Rep. 14;) or to add anything to an agreement respecting lands, because contrary to both the common and statute law. *Putricks v. Poulet*, 2 Atk. 383. Under the fourth branch, see *Vandervoort v. Col. Ins. Co.*, 2 Caines' Rep. 155.

As to the admissibility of parol testimony, it has been ruled that it may be resorted to when to explain a latent ambiguity, or one which does not appear on the face of the instrument, but arises from circumstances extrinsic, and yet upholds the writing, as to show who is meant under a devise by the testator to his son John, when he had two of that name, and thought the elder dead; (*Cheney's Case*, 5 Rep. 68; *Couden v. Clerk*, Hob. 32;) so where the bequest is of a trunk, and the testator has left three; (*Pendleton v. Grant*, 2 Vern. 517,) so as to ascertain the real person intended, though misnamed, there being no other to answer the description; (*Hodgson and Caldicott v. Hodgson and Fitch*, 2 Vern. 598;) or that the person intended was called by the testator as named, there being no other living of that name; (*Beaumont v. Fell*, 2 P. Wms. 141; *Parsons v. Parsons*, 1 Ves. jun. 266;) for in all these cases the evidence coincides with, and supports, the instrument, therefore parol testimony may be adduced to explain a contract according to the legal operation of the deed, though in abridgment of its general terms; (*Schuyler v. Ross*, 2 Caines' Rep. 202;) or to show what freight was agreed on, where a charter party expresses none; (*Foot v. Salway*, 2 Ch. Cas. 142;) or to prove a collateral fact which explains the nature of an equivocal instrument; as that an apprentice fee was given, and, therefore, the deed intended to be articles of apprenticeship, though the word "apprentice" was not used, and it might otherwise have stood as a contract for hire; (*The King v. Landon*, 3 D. & E. 379;) or that provisions stated, in a written receipt, to have been received "for account of the plaintiff," from the master of a vessel, were received to sell on commission, and not as a purchase; (*M'Intyre v. Pearwall*, 3 Johns. Rep. 319;) or that goods mentioned in a bill of parcels to have been bought of I. & D. were not their joint property, but part the sole property of D. and the residue the sole property of I., who had authority to sell the part of D.; (*Harris v. Johnston*, 3 Cranch, 311;) or to show the ex-

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of the children, and Mary Bowen, the mother of the defendant was another.

By a deed of partition, reciting the will, the 100 acres devised to Mary were set out, and the residue of the patent apportioned among the four sons.

The north and south lines of Mary and Johannes were the same; the dispute was respecting the east and west *boundaries. If the lines and courses were [*359] run according to the deed of partition, the lands in controversy would fall within the limits of the plaintiff's division, but Mary Bowen would not then have her 100 acres. If, on the other hand, the acknowledgments of the ancestor of the lessors and themselves, together with a claim of right, but not a *pedis possessio* of the whole, were to prevail, the defendant would be entitled

On the trial, it was attempted to prove, by parol testimony, that the partition deed, in giving a north course on the east side of the lot of the lessors, for 86 chains from the southern line, was a mistake, and that it ought to have been extended only 29 chains; in which case, by running the line west to the common north and south boundary, the right of the defendant would be established, in conformity to the several quantities of land, the will and partition deed purported to be the right of the various claimants under them, and also in strict coincidence with known landmarks.

tension of time for performing a written contract not under seal; (and as it is presumed not then broken, *Keating v. Price*, 1 Johns. Cases, 22,) or whether an advance of 5 per cent. agreed in writing to be paid on so many shares of bank stock, was an advance on the amount of the shares, or on the sum paid in on them; (*Cole v. Wendell*, 8 Johns. Rep. 116;) or that the money consideration in a deed was greater than that expressed; (*The King v. Scammonden*, 3 D. & E. 414;) or, as it is there said, that there were other considerations. In cases of fraud, parol testimony is always received; as to show that the natural love and affection stated as a further consideration, was no part of it; (*Filmer v. Gott*, 7 Bro. Par. Cas. 70;) or that a will was executed under duress. *Jackson v. Kniffen*, 2 Johns. Rep. 31. See further on this subject in the index of Sugden's Law of Vendors, tit. "Parol Evidence." *Rashfield v. Careless*, 2 P. Wms. 158, and the cases in the note there, by Mr. Coxe.

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The judge, however, overruled the testimony, as contradictory, and not explaining the deed.

Upon this, and the testimony adduced, which is set forth, the jury found for the plaintiff.

A motion was now made to set aside the verdict, as contrary to evidence and law, and also on account of the misdirection of the judge to grant a new trial.

Cady, for the defendant, to show the mistake in the partition deed, ingeniously located the 100 acres devised to Mary Bowen, and the quantity to which the lessors of the plaintiff would, under that, and the will of Victor Putnam, be entitled; and this could not be done, but by running the north and south lines on the eastern boundary of the plaintiff, 29 instead of 36 chains, he contended that the deed was *felo de se*, unless so explained. He contended also, that the action was not maintainable, as there had been an adverse claim of the whole lot, accompanied with an actual possession of part, in right of the title to the whole, and adverse to all others.

[*360] **Van Vechten*, contra, insisted on the admissibility of the parol evidence to do away the words of the deed, and that a purchase might be presumed of any *extra* quantity. He strongly urged the impropriety and danger of extending the effect of adverse possession beyond the land actually enclosed.(a)

(a) A possession, when relied on as a bar, must be adverse to the title which is claimed; therefore, when taken during a particular estate, it will not run against those in remainder. *Jackson v. Schoonmaker*, 4 Johns. Rep. 390. On the same principle, where the court of chancery settles the rights of claimants to land by directing a partition, an adverse possession, as among themselves, can begin only from the time of the decree. *Jackson v. Bradt*, 2 Caines' Rep. 169. To constitute an adverse possession, it must be adverse at the time of its commencement, and so continue for 20 years without interruption; (*Brandt v. Ogden*, 1 Johns. Rep. 156;) consequently no possession of another can be set up by a person coming in under him, which he, under whom such person comes in, could not himself set up; (*Jackson v. Harder*,

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THOMPSON, J., delivered the opinion of the court. An application is made for a new trial, on two grounds.

1st. That the verdict was against evidence; and,

2d. That the court improperly precluded the defendant from showing that there was a mistake in the partition deed, under which the parties respectively claimed, by which the lessors of the plaintiff had more land than was intended to have been conveyed.

From the testimony, as stated in the case, it appears that Johannes Putnam, the father of the lessors of the plaintiff, and Mary Bowen, the mother of the defendant, were brother and sister, and children to Victor Putnam, under whose will, bearing date the 5th of July, 1755, they derived title. That on the 19th day of September, 1765, the children of Victor Putnam executed a partition deed, whereby lot No. 1 was conveyed to Johannes Putnam, father to the lessors

4 Johns. Rep. 202;) it follows, therefore, that as a squatter comes in under the title of the true owner, no person, deriving his possession from a squatter, can set it up as adverse to the rightful proprietor. Where the deeds upon which a defence in ejectment is rested, prove void, and the defendant has recourse to adverse possession, alone, he must show it by a real, substantial enclosure, an actual occupancy, a *pedis possessio*, which is definite, positive and notorious. A mere possession fence is not enough. *Jackson v. Schoonmaker*, 2 Johns. Rep. 230. Observe the distinction where the possession is by claim under a deed conveying a right, (as in the text,) and under which possession is taken. An adverse possession of above 40 years, according to an acknowledged but erroneous line, is a complete bar; (*Jackson v. Dystling*, 2 Caines' Rep. 198:) so if according to an erroneous survey and partition thereon. *Jackson v. Hasbrouck*, 3 Johns. Rep. 331. A possession of 25 years, with color of title, though by the maps and deeds it be according to an erroneous line, gives a complete title against all the world; (*Stuyvesant v. Tompkins & Dunham*, 9 Johns. Rep. 61;) even against a defendant who has recovered by default in a former suit, the same premises from the plaintiff, though both parties derive title under the same deed, and a recent survey show the location incorrect; (*Jackson v. Dieffendorff & Zoller*, 3 Johns. Rep. 269;) for after a possession of above 25 years, (the case is 40,) according to a map and survey, the correctness of the locations cannot be disputed by the parties, or those claiming under them; (*Jackson v. Vedder*, 3 Johns. Rep. 8;) but a possession of 8 years, though according to a line designated by the lessor of the plaintiff, is no bar against a correct location made 40 years antecedently *Jackson v. Douglas*, 8 Johns. Rep. 367.

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of the plaintiff, and lot No. 8 to Mary Bowen, mother to the defendant; and the question between the parties is, where is the line of division between the two lots? The plaintiff having made out a title to lot No. 1, and the defendant to lot No. 8; James Lansing, a surveyor, and witness on the part of the plaintiff, testified that he had run the western and northern lines of lot No. 1, according to the partition deed; and that some of the premises in question, according to such survey, were included in that lot.

Jacob Rees, a witness on the part of the defendant, swore he was 55 years old, and that as long ago as he could remember, Mary Bowen was in possession of the land now held by the defendant; and that she died in possession; [*361] she had some land enclosed in fence down as far south as the road; she used to live 4 or 500 paces south of the road, but that just before the war, she moved down close to the north side of the highway. That about 14 or 15 years ago, Johannes Putnam showed him his west line, and told him he began at the Mohawk river, and ran northerly nearly to the highway, to a pine tree, and that the land north of that was his sister's, Mary Bowen. That when Johannes showed him this line, Mary was in possession of the land north of the road. That about seven or eight years ago, Francis I. Putnam put up a stone near the pine tree shown him by Johannes, and said that was his corner, and that at this time the defendant was in possession of most of the land on the north side of the road, which he now holds. That the whole of the land now held by the defendant was not cleared or in fence, at the time of Mary Bowen's death.

Jacob Hall, another witness on the part of the defendant, swore that about 36 years ago, Johannes Putnam told him his land went no further north than the road, and that Mary Bowen owned the land north of the road. That at this time, or shortly after, Mary Bowen lived near the road; she had before lived farther north. Johannes Putnam called the witness particularly to show him where his line was.

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It appeared also, by the testimony of Abraham Conyne, that about ten years ago he applied to Francis I. Putnam, to rent him part of a house that stood near the road, on the north side; that the said Francis declined hiring it to him, but referred him to the defendant, of whom the witness leased the house for one year; the witness understood that Putnam did not claim north of the road. Lewis Clement also testified, that about seven or eight years ago, he assisted Francis I. Putnam in making a fence between these lots on the south side of the road; that the defendant came to them and inquired of Putnam if he was making the fence on the line, to which he answered that he was, as it had been shown by Jacob Rees and the defendant. It appeared also that Mary Brown died about 15 years ago.

*On the part of the plaintiff it appeared, that [*362] part of the premises in question, adjoining the road, were unimproved at the expiration of the war. It also appeared that about six or seven years ago, the lessors of the plaintiff claimed the premises, by threatening to dispossess one Peter Lawrence, who afterwards took a lease under them. But Lawrence had the possession from Jacob Rees, who held under Abraham Conyne, who, it appears, had hired it from the defendant.

The partition deed between the ancestors of the parties bears date in the year 1765, wherein lot No. 1 claimed by the lessors of the plaintiff, is described as beginning at the Mohawk river, and running a northerly course 36 chains, describing no monument at the termination of this line. It appears from the testimony of the surveyor, that to extend this line northerly the number of chains given in the deed, and then pursue the other given courses, would include part of the premises in question. But the testimony on the part of the defendant appears to me to be strong and irresistible with respect to the actual possession for a long series of years; and that, in fact, no possession was ever had of the premises by the lessors of the plaintiff, or their father, under that deed. And that, admitting the deed to cover the

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land, still the plaintiffs, and those under whom they claim, have abandoned it for such a length of time as to preclude them from a recovery, at least in this form of action. It is true a man may be mistaken with respect to his title, and, perhaps, ought not to be concluded by his confession, if made under circumstances inducing a suspicion of imposition or ignorance, neither of which appears in this circumstance, and when acquiesced in for the length of time, as in the present case, he ought to be concluded. It appears that the premises lay north of, and adjoining to, the highway, which is the division line between the parties, according to their present possessions: the lands of the plaintiff laying to the south, and those of the defendant to the north of this road. Two witnesses on the part of the defendant testify, that as much as 36 years ago, which must have been very shortly after the partition, Mary Bowen was [*363] in the possession of the premises, the possession of Johannes Putnam going no further north than the highway; and it appears by the testimony of one witness, that as far back as the period above mentioned, Johannes Putnam showed him the line between him and his sister Mary, and declared to him that his land went no farther north than to the road; that the land north of the road was his sister Mary's. The same declaration was made to another witness about 14 or 15 years ago, and since the death of Johannes Putnam, the lessors of the plaintiff have repeatedly recognized the same line, both by their declarations and acts, and never showed any dissatisfaction until about six or seven years ago. Thus it is clear and conclusive, from the testimony, that the defendant and Mary Bowen, his mother, under whom he claims, have been in possession of the premises for at least 36 years, claiming them and using them as their own, adversely to any other claim, and with such repeated recognitions by the lessors of the plaintiff and their father, of the right of Mary Bowen, as to show conclusively that they disclaimed having any right or title to the premises, which is sufficient to rebut every pre-

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sumption that Mary Bowen held under them. The premises being held under such circumstances, for such a length of time, is, we think, sufficient to protect the possession against this action.

We are of opinion, therefore, that the verdict is against evidence, and that a new trial ought to be granted.

Being in favor of a new trial, it would be unnecessary to give an opinion on the other question, did the court entertain the least doubt on the subject. The plaintiff's deed gives 36 chains on the first line; the defendant contended it ought only to have been 29 chains, and the testimony offered and overruled, was to prove that fact: this was not to explain any ambiguity, but was directly contradictory to the deed, and manifestly inadmissible.[1]

PEYTON *against* HALLETT.THE SAME *against* DELAFIELD.

A warranty of being "the property of an American citizen," is proved by reputation, employ and domicil. Interest in a vessel, by a person who has the original register, in the name of the owner, when she was about to sail on the voyage insured. Interest in a cargo, by knowing the articles bought by the plaintiff, and seeing them go on board. A witness who has an order to be paid out of the sum to be recovered in a suit, drawn upon the agent who is to receive such sum, is not a competent witness, though the order is not accepted. To prove an abandonment, though made in writing, parol evidence is admissible: and it is not necessary to give notice to produce the letter of abandonment, to enable to show the original of which it was a copy.

THESE were actions on two policies of insurance, one on the body, the other on the cargo, of the sloop Ruby, *on a voyage from Charleston to the Mantanzas, in [*364] Cuba, "*warranted the property of an American citizen.*"

[1] See *Cameron v. Irwin*, 5 Hill, 272; *Clark v. Wetley*, 19 Wend. 320; *Fuller v. Acker*, 1 Hill, 473; *Jackson v. Hart*, 12 J. R. 77; *Jackson v. Croy*, 15 Id. 427; *Fitzburgh v. Runyon*, 8 J. R. 375; *Jackson v. Britton*, 4 Wend. 507

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On the voyage, the vessel was taken and carried into New Providence, where she, on the 9th of December, 1801, was acquitted, but her cargo condemned as lawful prize. The abandonments were made the 7th of January, 1802.

The plaintiff, to prove his interest in the subjects of the insurance, called one George White, who was objected to by the defendant's counsel as incompetent, on account of an interest in the event of the suits. It appeared that White, who was sworn on his *voir dire*, had received, for a debt due to him from the plaintiff, an order on his agent, to be paid out of the sums to be recovered in these actions, but the agent had not accepted the order, though he promised the debt should be paid out of what he might receive, and the witness expected to be paid accordingly. White, however, further swore, that as his right did not depend on the event of the suit, he should look to Peyton for payment whether he recovered or not. On this his testimony was admitted, and the plaintiff went on to prove his interest in the vessel, by the evidence of White, which was again opposed, but overruled.

White then testified that he had seen a register of the vessel, in the name of the plaintiff, and that she sailed under it, on the voyage insured. In corroboration of this the proceedings in the vice admiralty, under seal of the court, were produced, setting forth a copy of the register in due form. It also recited a bill of lading, in which freight was mentioned to be payable in the following manner: "*as customary no. prime and average accustomed*,"

The interest in the cargo was established by the same witness, who swore to having attended the plaintiff to select the articles purchased, some of which he saw on the wharf where the vessel lay, and going on board.^(a) The counsel for the plaintiff, as additional proof, adduced bills

(a) A bill of lading verified by the captain is proof of interest in a cargo. *M'Andrew v. Bell*, 1 Esp. Rep. 173. So, though dated after the loss of it took place, while the vessel was loading. *Graham v. Penn. Ins. Co.*, 3 Cond. Marsh. 709

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of parcels of the articles specified in the invoice, and made out by the vendors, whose hand-writing he offered to prove; but this latter testimony was rejected.^(a) (See *Russel v. Boehme*, 2 Stra. 1127, contra.)

No other reason than the capture was offered for the non-production of the vessel's register and bill of lading.

To substantiate the citizenship of Peyton, a copy of record of his naturalization was offered, which being objected to as informal, was withdrawn; and the counsel for the plaintiff then relied on the testimony of White, who swore that he had known Peyton to have resided in Charleston four or five years, but how much longer he could not tell: that he had known him to command vessels registered as American, sailing under the American flag, and carrying ten or twelve guns; but that he had heard the plaintiff say he was born in Ireland; though he had also heard him say he was naturalized in 1787, and that he was reputed an American citizen.

To establish the abandonment, the agent of the plaintiff was adduced, who deposed, that on the 7th of January, 1802, he left letters of abandonment (a copy of which he at the same time offered) at the office of the broker who effected the insurance, to be delivered to all the underwriters on the vessel and cargo, but whether they were delivered or not, he could not say. The clerk, however, of the broker, certified that if the letters were left, they must, from the regular course of business in the office, have been delivered, though he himself remembered nothing of the transaction.

Notice to produce the letter of abandonment had never been given to the defendants.

On this a nonsuit was moved for, it being contended that

(a) To prove the amount of a loss, an account of the sales of an adventure under the hand of the factor, held, on proving his hand-writing, to be good evidence. *Riche and Richards v. Broadfield*, 1 Dall. 16. So an invoice sent to the plaintiff. *Graham v. Penn. Ins. Co.*, 2 Cond. Marsh. 709.

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the plaintiff had not shown enough to entitle him to recover. The judge who tried the cause seemed to think the citizenship not sufficiently established, but that a verdict might be taken, and this, together with the other points, reserved by the defendant.

The jury accordingly found for the plaintiff in both suits, subject, on a case to be made by the defendant, to the opinion of the court, whether a nonsuit should be entered, or a new trial granted.

[*366] *Pendleton, for the defendants, made the following points:

- 1st. That George White was not a competent witness.
- 2d. That the vessel being American, parol proof of ownership was not admissible.^(a)
- 3d. That parol proof of the abandonment was not admissible, the abandonment having been made in writing, and notice to produce it not having been given.
- 4th. That there was no proof of the property being that of a citizen of the United States.
- 5th. That admitting these points to be against him, the plaintiff could not recover on the vessel, as she was acquitted at New Providence the 9th of December, 1801, and the abandonment not made till the 7th day of January following.

On the first point, he said, it was only necessary to read the case; by this it appeared that White's interest was direct. He was to be paid out of the fund. Could any man doubt that he who is to be paid out of a fund, is interested in creating that fund? In *Powell v. Gordon*, 2 Esp. Rep. 735, having a power of attorney to receive the money for which the suit was brought, excluded the holder of it from

(a) Exercising acts of ownership in directing the loading, &c., of a ship, or paying the people, (*Amery v. Rodgers*, 1 Esp. Rep. 207,) or ordering and paying for her stores, &c.; (*Thomas v. Foyle*, 5 Esp. Rep. 89;) so her register, or the affidavit of a co-defendant (returned *non est*) for obtaining the register are evidence of interest in her. *Woods v. Courter et al.*, 1 Dall. 141.

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being a witness. It is true, the order was not obligatory on the agent, but still it was a lien on the fund. A mortgage is but a collateral security for a debt; the mortgagee, however, is not, in an ejectment, a witness for his mortgagor. It is no answer to this to say, that here the matter was but a *chose in action*, for, of that *chose in action* the order made White an assignee *pro tanto*, which a court of equity would notice. *Row v. Dawson*, 1 Ves. sen. 331.(a) So in *Yates v. Groves*, 1 Ves. jun. 280, the holder of an order not accepted, but verbally promised to be paid out of the fund, was held to have a lien on the fund.(b) White, therefore, had a direct interest.

On the next point he argued, there could be no doubt. Matter of record can be proved only by record. By the 9th section of the register act of the 31st December, 1792, it is enacted, that "The several matters herein before required, having been complied with, in order to the registering of any ship or vessel, the collector of the district, *comprehending the port to which she [*367] shall belong, shall make and keep in some proper book, A RECORD or registry thereof, and shall grant an abstract or certificate of such RECORD of the registry, as nearly as may be in the form following," &c. We see thus, that by an act of the general government, the register of a vessel is made a matter of record, and, therefore, its contents should be proved by an exemplified copy, and not by parol.

Parol proof is equally inadmissible in cases of abandonment, where that abandonment has been made in writing, because the writing is to speak for itself, and therefore, notice to produce is always given. Many of the first practi-

(a) That was a case between the assignees of a bankrupt, and the holder of an order drawn by the bankrupt, on money due him on an exchequer warrant, and that order lodged with the teller. This was held an assignment against the assignees who represented their bankrupt.

(b) That also was a case against assignees, to declare a lien on the money in their hands.

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tioners at this bar have suffered nonsuits on this very point, merely on account of notice not having been given. As to the proof of citizenship, there is none. The very evidence called establishes that the plaintiff was born in Ireland, and the English courts of admiralty have decided that an English subject cannot trade with an enemy, to the port of whom the vessel in question was bound. So sensible was the plaintiff's counsel of the inadequacy of testimony on this point, that he almost abandoned it by withdrawing what was called a certificate of naturalization.

The last argument on which we mean to rely, is, that the abandonment was clearly out of season. The sentence was on the 9th of December, and the abandonment not till the 7th of January. The usual passage from Nassau to New York is 8 or 10 days; here nearly 80 elapsed; and at least as to the vessel, it was too late, for that was acquitted; and it may well be supposed the news of her liberation arrived with the account of the capture.

Caines, contra. Against retaining the verdicts, which have been given in our favor, a long list of five objections has been urged. First, that White was not a competent witness,^(a) and for this the reason assigned is, that he had

(a) That no person shall be permitted to testify for himself, and that the law regards immediate and not remote consequences, seem to be the two principles of our jurisprudence by which the incompetency of witnesses is determined. The rule to be drawn from them has not been always laid down in exactly the same terms. The most correct induction appears to be that of Buller, J., in *Bent v. Baker*, 3 D. & E. 96: "Is the witness to gain or lose by the event of the suit?" But this, perhaps, is not sufficiently close, for it leaves undefined the nature of the gain or loss, which, as truly stated by Yates, J., in *M'Leod v. Johnston*, (4 Johns. Rep. 129,) must be "vested or certain, and not remote, possible or contingent." On an analysis of the cases which, however, have their repugnancies, the rule to be extracted may possibly be this: "Where the legal effect of the verdict will operate to the immediate advantage or disadvantage of a witness, he is incompetent." Therefore, 1st. Parties to the record; (Osb. L. Ev. 121,) though guardians, (*Chaffin v. Lord-Huntington*, 1 Stra. 506.) or *prochein ami*; (*Hopkins v. Neale & Newman*, 2 Stra. 1026,) are inadmissible, because liable to costs. So, though

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an interest in the event of the suits. To judge whether this is so or not, it will be necessary to advert to the species of interest which he possessed. A recurrence to

mere trustees, and liable only in the first instance, having, by statute, a compensation over; (*The King v. Governors, &c. of St. Mary Magdalen*, 3 East, 7, overruling, in that point, *The King v. Woodlands*, 1 D. & E. 261;) or defendants only named in the *simul cum*, if the plaintiff can prove them guilty by producing the process against them, and showing an ineffectual endeavor to arrest, cannot testify for the other defendants. *Reason v. Eubank*, Bull. N. P. 286. 2d. Persons directly interested in the subject matter of the suit, though not parties to the record; as a tenant in tail of a vested remainder expectant on an estate-tail, to testify in support of the title under which he claims; (*Smith v. Blackman*, 1 Salk. 283;) or a landlord to prove for his tenant a right of common in the lands demised; (*Ancomb v. Shore*, 1 Campb. 290;) or a commoner the same for his fellow commoner, (*Id. ibid.*) if it be under a custom for all; (*Hockley v. Lamb*, 1 Ld. Raym. 731; *Skin*, 174;) or an inhabitant of a town, a right of fishing in all inhabitants. *Jacobson v. Fountain*, 2 Johns. Rep. 170. The law is the same where the interest is in only a part of the subject matter; as in an action for taking and carrying away a barrel of liquor by the proprietor of the barrel, the owner of the liquor cannot testify for the plaintiff. *Gage v. Stewart*, 4 Johns. Rep. 293. 3d. When the legal operation of the testimony would be to immediately create or increase a fund on which the witness would have, or has, a direct claim; as a person having a deed from an ancestor which would charge the lands in question in the hands of the heir, to give evidence in support of the heir's title; (*Tr. per Pais*, 386;) or a creditor of a bankrupt to prove him a gamester, and so destroy his right to an allowance under the statute; (*Shuttleworth v. Bruce*, 1 Stra. 501;) or to establish a petitioning creditor's debt under a second commission, when he was a creditor under a former, and the bankrupt had, before certificate, promised him payment; (*Roberts v. Morgan*, 2 Esp. Rep. 736;) or, after proving his debt, to establish a demand for the assignee; (*Williams v. Stevens*, 3 Campb. 301;) or a creditor having a demand on an insolvent estate, to establish one for the administrator; (*Craig v. Cundell*, 1 Campb. 361;) or to create a new liability to himself, and a fund to answer it; (as in the case in the text;) or to create a fund in discharge of his own liability. *McLeod v. Johnston*, 4 Johns. Rep. 126.

4. When it would immediately exonerate the estate or the person of the witness from an existing charge or liability; as an inhabitant having lands rated in a parish or town, to give evidence on a question of settlement, though the land stand rated in the name of another; (*The King v. Ellorby*, 10 East, 292;) or a drawer of a bill who has received notice to show, in an action against the acceptor, that it was paid; (*Humphrey v. Moore*, Peake's Cas. 82;) or a petitioning creditor, who is bound in a penalty to present the commission with effect, to support it; (*Green v. Jones*

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[*868] *the case will evince it to be no more than an order to be paid out of the money that *might* be recovered under the policies on which we now proceed.

2 Campb. 411;) or a person shown to be a partner with the defendant, and as such liable to contribute for the costs, to defeat the action, by proving himself liable alone; (*Goodacre v. Bream*, Peake's Cas. 174;) or a bound bailiff or deputy, to whom a writ has been delivered, to prove, in an action against a sheriff for not arresting, an endeavor to take; (*Powel v. Hord*, 1 Stra. 650;) or bail to the sheriff, after an attachment against him ordered to stand as security, to testify on behalf of the defendant; (*Piesley v. Von Eck*, 2 Esp. Rep. 605;) or a vendor of a chattel, for his vendee, in an action against the latter for taking it away, when the defence goes to the title; (*Hernance v. Vernoy*, 6 Johns. Rep. 5;) or a grantor with warranty, against a purchaser of the same land under an execution on a judgment upon a warrant of attorney, signed without the knowledge of the grantor, by his partner, in the names of both; (*Swift v. Dean*, 6 Johns. Rep. 523;) or a grantor of adjoining lots, to prove their boundaries, in an action between his two grantees; (*Jackson v. Hallenbach*, 2 Johns. Rep. 394;) or a lessor in support of the title of his lessee; (*Smith v. Chambers*, 4 Esp. 164;) or a servant in an action for his negligence against his master, for the defendant; (*Jarvis v. Hayes*, 2 Stra. 1083; *Green v. New River Company*, 4 D. & E. 589; *Miller v. Falconer*, 1 Campb. 251; or a journeyman, who has been accustomed to receive money for goods sold, to prove their delivery, in an action by his master; (*Adams v. Davis*, 3 Esp. Rep. 48;) or a co-trespasser not sued, for the plaintiff, in an action against the other trespassers. *Barnard v. Dawson*, 2 Campb. 333, note. *Qu. it.* for this seems a mere possible interest. See *Mikward v. Hallett*, 2 Caines' Rep. 77.

5th. When the verdict, if contrary to his evidence would render him immediately liable to the party for whom he is called, as a payee of a note given without consideration, and who has since obtained his certificate under a bankrupt or insolvent law, to testify for the defendant, in an action against him as maker. *Maunderell v. Kennett*, 1 Campb. 488, n.

6th. Where the verdict would be evidence for or against him.

With respect to husbands and wives, it is now settled in the English courts, that, from motives of public policy, they cannot, in any case, be witnesses for or against the interests of each other; (*Davis v. Dinwoody*, 4 D. & E. 878;) and for the same reason their testimony is excluded in cases of non-access, as affecting their children born during the marriage. *The King v. Luffe*, 8 East, 193; *The King v. Kea*, 11 East, 122. It was formerly held that the incompetence of the wife was confined to cases where the husband was a party to the record; (*Baker v. Dixie*, Cas. temp. Hardw. 264; *Hall v. Hill*, 2 Stra. 1094;) and even in such cases if she had acted as his agent, her declarations were good to charge him on the contract she had made; (*Anon.*, 1 Stra. 527;) *a fortiori*, if he was not a party to the record, though her tes-

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This order was not even accepted, and so little did White rely upon it, so little did he feel himself concluded by the result of these actions, that he swore his right to look to the plaintiff did not depend on the suit; and, whether a recovery was had or not, he looked to Peyton for payment of his demand. With respect to witnesses, the courts have, especially of late days, confined the objections to their credulity rather than to their competence. Notwithstanding *Watt's Case*, (Hard. 331,) this has long been established. It is not a decision of modern times; we can trace it back to the earliest periods of law. In *Gunston v. Doime*, 2 Roll. Abr. 685, pl. 3, it is laid down, that if three persons join in one deposition, and three separate indictments are preferred against them, each is a *competent* witness, the one for the other."

LIVINGSTON, J. Show how the interest here does not incapacitate.

Caines. Every interest, to render a witness incompetent,

timony went to make him civilly liable; (*Williams v. Johnson*, 1 Stra. 504;) so in Virginia, even where she herself has, from the bounty of the plaintiff, a claim on his benevolence in the subject matter of the suit. *Baring v. Reeder*, 1 Hen. & Munf. 154. With us a wife, after the death of her husband, has been held admissible to show that a deed she had executed with him, but which it does not appear she had acknowledged, was antedated. *Jackson v. Burd*, 4 Johns. Rep. 230. Even in Westminster Hall, if the evidence of the wife go neither to support nor to contravene any interest of the husband, nor to affect him or the children of the marriage, as that of a wife of an executor taking no beneficial interest under a will, she is a good witness to prove it. *Bettison v. Bromley*, 12 East, 250. The principle, however, of *Davis v. Dinwoody* (and which, on examination, may, perhaps, be found the correct one) has lately been recognized by Lord Ellenborough, who decided that where the testimony of the wife, though living in a state of separation from her husband, went to show that he, instead of the defendant, was liable to the plaintiff, she was incompetent without a release to the husband. *Wright v. Wurdle*, 2 Camp. 200.

For cases in which the competency of witnesses has been decided, see *Milward v. Hallett*, 2 Caines' Rep 77, and the notes there.

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must be direct, and not circuitous. *Bent v. Baker*, 3 D. & E. 27. Your honors have already decided this point. In *Baker and Rowleston v. R. and H. Arnold*, (*Ante*, 258, and see what Kent J. says, p. 276,) an endorser of a note was held to be a good witness to prove the endorsement made after the note was due, though by his testimony he might let himself into all the equities subsisting between him and the maker. The reason of this is obvious: a possible advantage cannot exclude; to render incompetent, the benefit must be inevitable. When it is not so, it affects only the credit of the witness, and on that, like all other matters of credit, it is for a jury to determine. If they think the witness worthy of belief, they receive; if not, they reject his testimony. On these principles, therefore, it has been ruled, that where a man has laid a bet on the event of a suit, he is still a competent witness. *Barlow v. Vowel*, Skinn. 586; *George v. Pearce*, cited by Grose, J. in *Baker v. Bent*, 3 D. & E. 37. Nay, if the wager be [*369] that he will convict the defendant on an indictment the law is the same. *Rex v. Fox*, 1 Stra. 652, and per Lord Mansfield, in *Da Costa v. Jones*, Cowp. 736. So a creditor was allowed to prove that his debtor did not come within a species of insolvent law called the mint act. *Narcott v. Orcott*, 1 Stra. 650. Surely in this last case there was as great an interest as in the present; for, if the creditor established his debtor to be out of the provisions of the act, he had an immediate recourse against the person of the insolvent, and so came directly within the event of the suit. But, as it was only possible that the result might terminate to the advantage of the witness, he was adjudged to be competent. It is expressly laid down in Bull N. P. 288, 279, 290, that a remote interest can never exclude. It is not in one or two places alone that this doctrine is to be found; it is scattered and diffused through every portion of the law. A surety for an administrator, notwithstanding he may become liable on his bond for the faithful discharge of the administration, is a good witness to prove a

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tender in a suit to recover a debt due from the intestate, *Carter v. Pearce*, 1 D. & E. 163. It is, from these authorities, evident, therefore, that a *possibility of interest* goes not to the competence, but to the credit of a witness. Even this, to men of liberal minds, it would hardly touch. The objection, however, comes from the parties who now make it, in a manner peculiarly ungracious. They first create the necessity of borrowing, and then use that necessity as a means to avoid paying. From whom is a man, kept out of his right, to borrow; if not from him who is conusant of that right? There is not, to be sure, any express decision exactly in point, but so far as a *dictum* of the whole court of *king's bench* can operate in our favor, we have it now to advance. In the case last cited, (*Carter v. Pearce*,) their lordships, *una voce*, said, "if a *creditor* of the administrator had been offered as a witness, there could have been no objection to his being received." This, then, goes the whole length of our positions. Every creditor has an interest in the event of his debtor's suit; but as it is such a one as is remote, and merely possible, it cannot affect his *competence. Were the law to be otherwise, it [*370] would, in a mercantile country, be hardly possible to substantiate, by oral testimony, any species of debt whatsoever. And we find that in proportion as commerce has extended, the rigor of ancient rules respecting interest in witnesses has been constantly relaxed.

Against us some maxims and some decisions have been relied on, which, however, it is conceived, do not in the least invalidate the force of our arguments. It is said that the order in favor of White created a lien on the property in the hands of the agent. Allowing this to be so, that lien was but a possibility. There might have been five hundred previous orders, each to be preferred to this; or the agent himself might have had claims more than enough to absorb the whole of the funds when in his possession. That *equitable* liens should work *legal* incompetence is perfectly new in law. If it be so ruled, the court may, per-

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haps, see the doctrine of incompetence pervade cases as yet but little supposed to be within its influence.

The case of a mortgagee being inadmissible in an ejectment to testify for his mortgagor, is widely different from this. There the mortgagee has a direct legal interest, by the operation of a legal instrument. His mortgage gives him an interest at law.

I am aware that, after receipt of the sums in demand, there may, perhaps, be a remedy at common law for recovery of the amount of the order; that an action for money had and received may be maintained. But let it be remembered, this species of proceeding is, in its nature, like a bill in chancery. It admits of every equitable plea as a defence; set-offs, prior liens, and the whole train of occurrences which would give the defendant a title to prefer others to the plaintiff. The cases from Vezey, senior, and Vesey, junior, are nothing more than chancery decisions respecting funds in possession, and *Powel v. Gordon*, (2 Esp. 735,) is an authority directly in our favor. There the witness had a power of attorney to receive the money when recovered, so that the fund out of which his debt was to be paid, would

have come into his *own hands*; but your honors will [*371] please to observe that Lord Kenyon asked *him if he was willing to permit any other person to receive the money, and it was not till he refused this that he was deemed incompetent. The reasoning, then, of this decision is, that had the money gone into the hands of another, the witness would have been admissible, though it is certain his letter of attorney would have warranted him in demanding it from the receiver. The possibility of intervening claims did away the objection. So with us, as the money was not to go into White's hands, but into those of another, he stands precisely in the situation of the witness in *Powel v. Gordon*, had he consented to another's receiving the sum in litigation.

It has, therefore, it is presumed, been shown,

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1st. That objections ran more to the credit than to the competence of witnesses.

2d. That to affect the competence, the interest must be immediate.

3d. That White's interest was not immediate, but consequential.

4th. That admitting a lien to have been created by the order, *that* does not vary the matter.

5th. That the very case of a creditor witness was put by the whole court of king's bench, and allowed not to incapacitate; and

6th. That the inferences, unavoidably resulting from *Powel v. Gordon*, fully establish the competence of White.

The reasoning antecedently used on this point cannot, it is thought, be better concluded than in the words of Mr. Fonblanque, 2 Fonb. 457, when speaking of the rule respecting the interest of witnesses in causes, on the trials of which they are brought to give evidence; it is, he says, "the most flexible in its application of any."

The next objection to which it is necessary to advert, is, "that parol testimony of ownership was inadmissible." For this it has been relied on, that the register act has made a certificate of registry a legal record. It surely will never be imposed on me to demonstrate that such an instrument, or the book in which it is kept, is not a *legal re-*

*cord, in the technical sense of the word, import- [372]

ing a verity which admits not of being contro-

verted or substantiated by oral proof. I shall only observe,

it has been ruled by Lord Kenyon, that exercising acts of

ownership, paying of men, directing the loading, &c. were

sufficient testimony of interest in a vessel. For, in com-

mercial contracts, the highest degree of evidence is not al-

ways required. The purpose of the register act was not

to make the proceedings under it of record, but merely for

state reasons, to enable to collect the duties on tonnage, by

ascertaining what ships belong to foreigners, and what are

our own.

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It is, thirdly, insisted by the defendants, that as the abandonment was made in writing, and notice to produce it not given, parol proof of the abandonment ought not to have been received.

It is worthy of observation that the abandonment is not denied; it is only asked that we should not be permitted to show it. It cannot be argued that it is indispensable to make the abandonment in writing. We admit it to be usually so done: that however, is nothing more than matter of caution. It was, on that account, done here. But there is no case to show we were obliged to do it. If so, we may prove the contents or effect of the letter of abandonment, without notice to produce it, because it now becomes a fact, like every other, to be established by parol testimony.

In order to decide on the necessity of giving a notice to produce any written paper served on the opposite party, we have only to call to mind the reasons why it is in any case required. They are, lest a misrepresentation should be made of any fact which constitutes the *foundation of the action*, and which, though in possession of the opposite side, yet being unnecessary to his case, might not be brought by him. When, therefore, the contents of the paper in question are not the foundation of the action, a notice to produce it is totally superfluous. Therefore, in cases of notices to quit; notices to a magistrate previously to [*373] commencing an action *against him; the demand in writing of a warrant before proceeding against an officer, or any similar case, notice to produce the notice, need not be given. *Jory v. Orchard*, 2 Bos. & Pull. 39. So an attorney's bill, on which an action has been brought, may be proved without notice to produce the one delivered under the statute. *Anderson v. May*, 2 Bos. & Pull. 237. So, payment of rent by a tenant in possession can be established, without notice to produce the receipt. *Runn, Eject.* 289.(a) Because, wherever the matter is collateral,

(a) So the contents of a notice of the dishonor of a bill. *Achard v. Pomeroy* & Campb. 601.

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parol evidence is adequate to every purpose. The idea of this necessity of giving notice, has arisen from a confounding of cases. From mistaking that to be the foundation of the suit, which is only used in proof of the demand. It is but a mere formality, which the right of action by no means depends.

Another reason may also be offered to evince the nugatoriness of a notice to produce the letter of abandonment. It was sufficient to establish it by the copy offered at the trial. Wherever a number of copies are simultaneously made, they are, in law, all originals. Because, being created *uno flatu*, one is considered the same as the other, and may equally be read in evidence without notice.^(a) *Gottlieb v. Danvers*, 1 Esp. Rep. 455. So the counterpart of indentures. *Burleigh v. Stibbs*, 5 D. & E. 465.^(b)

Having, it is hoped, obviated the three first difficulties to our retaining our verdicts, the fourth which presents itself, is, "that there is no proof of the property being the property of a citizen of the United States;" or, in other words, that the warranty of American citizenship has not been complied with.

In combating this objection, we beg leave to state, that in this country there are three different kinds of citizens.

1st. Those who became so at the declaration of independence.

2d. Those who, since that period, have become so by naturalization.

3d. Those who are so by domicile and employment.

Thus much being premised, it will be necessary to call the attention of the court to those doctrines, on which *the law of warranties has been held to rest. [*374] According to those, it suffices if the warranty be

(a) *Surtess v. Hubbard*, 4 Esp. Rep. 203; *Phillipson v. Chase*, 2 Campb. 111.

(b) In that case the counterpart signed by the defendant only was allowed to be given in evidence to prove an apprenticeship to him by a third person merely because it recited such an indenture.

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complied with in conformity to its *letter*, without any regard being had to its *spirit*. In consequence of this principle, an opposite maxim has been sanctioned, that no *virtual* fulfilling of a warranty can be allowed. What, then, in the present case, can be deemed to fulfil the warranty of American citizenship? Will it be pretended that the person warranting must be a citizen, such as those who became so at the declaration of independence? This will hardly be said; and should it be, there is no case to warrant the assertion. Is there any decision which declares he must be a citizen by naturalization? None; for this would exclude all original citizens. Neither can it be insisted that he must be a citizen with all the rights and privileges of an American; because a naturalized American, one who did not become a citizen by the declaration, is not eligible to the office of President of the United States, or that of Governor to any individual state. Both positions are equally untenable. Of what species of citizens, then must he be? One by domicile^(a) and employ? Why? Because this embraces every class of citizens, and answers every purpose of the warranty. Let us, for an instant, recur to the reasons on which a warranty is given. It is to assure the underwriter that the subject-matter of the policy is American, and within the protection of the law of nations. It has been long ago settled that personalities follow the person. On this account domicile for ever regulates distribution of effects. That the principle is peculiarly adhered to in matters of prize is notorious. The merchandise of a friend, resident in the country of an enemy, is liable to confiscation; for it is the domicile that stamps the national character. So the employ of a master of a ship invariable fixes the nation to which he belongs. *The Embden*, 1 Rob. Adm. Rep. 16. *The Vigilantia*, and cases there cited, *ibid.* 1 *The*

(a) *Ramsey v. United Ins. Co.*, Oct. term, 1790, Sup. Court N. Y. The warranty of American property held not complied with from the assured's domicile being in a belligerent country, though it was admitted he was an American citizen. MS. Kent, J.

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Harmony, 2 Rob. Adm. 322. *Mr. Ostermeyer's Case* *ibid.* 41. *Mr. Johnson's*, *ibid.* 17. *Owners of the sloop Chester v. Owners of the experiment*, 2 Dall. 41. The case states Peyton a resident, and known master of American *vessels, naturalized from residence(a) and employ. [*375] In this view he is beheld by the admiralty court in Nassau, and the property they acknowledged as his they acquit as neutral. Every protection, then, has been afforded which the warranty was meant to confer, and Peyton, in the eyes of a foreign tribunal, and according to the law of nations, stands confessed an American citizen. In every part of insurance law the same principle is to be found. If within the letter of the clause, it is enough. A ship was warranted well on such a day; she was well at 6, but lost at 8 o'clock, and held a compliance. (*Blackhurst v. Cockell*, 3 D. & E. 360.) So here, warranted the property of an American citizen. Not a citizen with all the rights and privileges of an American citizen; not even a naturalized citizen; but a citizen adequate to all the purposes of protection, intended by the warranty, a citizen *de facto*, though not *de jure*. I am aware the ground now taken is, in cases like the present, perfectly new. It is not, however, a ground on which this court has never trodden. We but follow their footsteps in other causes. In *Goold and another v. Gracie*, June term, 1798, under a clause in a policy, that if an assurance was effected in Europe, the premium was to be returned, deducting one half per cent. it was held, *unanimously*, that a policy *de facto* was within the meaning of the words, and the insurer exonerated, though the policy was void *ab initio*, and therefore, a recovery could never be had. So, by *Buller, J.* in *Wilkinson v. Payne*, 4 D. &

(a) Therefore, a warranty of a ship as "American property," when the owner resides in England, is falsified by that circumstance, though he be in fact an American citizen. So a British subject, domiciled in America, is considered, by the law of nations, as an American citizen. *Tabbs v. Bendelack*, 4 Kap. Rep. 108.

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R. 468, a marriage *de facto* was said to be sufficient to entitle to recover on a promissory note.

If, however, the court shall be against us on this principle, still we shall contend that the citizenship of Peyton is substantiated by evidence in the cause.

It is an acknowledged axiom that every man's testimony is to be received or rejected *in toto*. You cannot cut and garble it. Take one line, if it suits your purpose, and then reject the next; his alienage is before the court, *from his own confession*, and so is his naturalization. If you believe him on his word that he was an alien born, you must believe him on his word that he has been naturalized since. As a *man is charged, so he shall be discharged(a) If his own declaration is to determine him an alien, his own declaration shall show him an alien *naturalized*. His acknowledgment of his foreign birth is nothing more than *presumptive evidence* of his being now an alien. He might have been one by birth, and yet have become a citizen at the declaration of independence. General Gates, Governor Clinton, Washington himself, were all aliens by birth; being, therefore, born an alien, is no more than presumption of his being so now, and presumption may always be rebutted by presumption. *Tysen v. Clark*, 3 Wils. 541. *Runn. Eject.* 262. Allowing then, for argument's sake, the declaration of having been naturalized to be laid aside, what presumption does the case afford to counteract this presumptive evidence of alienage. First, there is a general reputation of the plaintiff's being a citizen. It will not be denied that in many instances, reputation is, of itself, good testimony. It is adequate to establishing a pedigree or a marriage. Per Holt, Ch. J. in *Dr. Hartcourt's Case*. Yet in each of those, certificates may

(a) Therefore, where an objection to the competency of a witness arises out of an answer on his cross-examination, he may, in the same manner, restore himself to competence by showing the disability removed. *Butcher's Company v. Jones* 1 Esp. Rep. 160. So if on his *voir dire* *Batham v. Stringer* *ibid.* 164.

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he adduced, and the doctrine of Holt is now allowed in England, though registers in both those cases are ordained by statute law, and certificates of each may be, and are every day, adduced. So to ascertain who was the patron of a living, in *The Bishop of Meath Lord Belfield*, 1 Wils. 215, presumption was allowed. If ever there was a country in which presumption of citizenship ought to be conclusive, it is this. I may again instance General Washington, nay, your honors who now sit on the bench have nothing else to offer; you have no naturalization, no document to show, but the places you fill, and general reputation would give to you the character, and to your children a title, to the estates you may leave. So with Peyton, were he to die to-morrow, his issue would take his real estate, in right of his citizen father. Shall then, his reputation of citizenship be good to support a claim to land, and yet be inadequate to one against an underwriter? Are three fourths of the community to be cut off from the only mode by which they ever had, or can have, a possibility of substantiating their right to the American *name? If [*377] more proof be required of the plaintiff's citizenship, it is afforded, and that by the case itself.

Before it is attempted to evince this, I shall beg leave to lay down three maxims.

1st. That all things done are presumed to be rightly done. *Griffin v. Stanhope*, Cro. Jac. 354; *Rex v. Morris*, 2 Burr. 1189; 1 Wils. 275.

2d. That situations occupied shall be supposed to be legally filled. *Lord Halifax's Case*, Bull. N. P. 298; *Lord Purbeck's Case*, cited, Cowp. 109.

3d. That fraud and misconduct shall be imputed to no man. *Chattle v. Pound*, Gilb. L. Ev. 103. If necessary, I shall first substantiate, and then apply these principles.

LEWIS, Ch. J. The principles will not, I fancy, be disputed.

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Caines. In order to apply them, it will be incumbent to advert to the testimony in the case.

It is in evidence that the plaintiff commanded an American vessel carrying guns. In order to capacitate him for this command, he must have been antecedently proved, to the satisfaction of the officers in the custom house, an American citizen; for none but an American citizen could occupy such a station. If so, then we are fully within two of the maxims; we have complied with their letter and their spirit; it is, therefore, to be presumed that what has been done was rightly done, and that the situation which Peyton did fill was legally occupied. The inference, consequently, becomes clear as day that the plaintiff is an American citizen. If we hesitate for a moment in pronouncing him so, we violate every one of those three maxims which have already been conceded. First, we must presume that what was done was not rightly done; secondly, that the station filled by the plaintiff was not legally occupied. We cannot even stop here; we must go on, and not only presume fraud and misconduct, but take for granted perjury upon perjury; all the penalties of the register act incurred, and a long connected system of false swearing, as if by vocation. These are the mild inferences suggested on the part of the defendants; they are such as your honors will surely never make; we trust we are peculiarly justified on asking for those for which we contend, because when reputation is accompanied with facts, it is good evidence. Per Grose, J. in *Roe v. Parker*, 5 D. & E. 32. Here, then, was reputation accompanied with the fact of Peyton's having commanded an American armed vessel. His citizenship is, therefore, established—

1st. By his domicile and employ.

2d. By the evidence of White.

3d. By reputation.

4th. By reputation accompanied with facts.

5th. By necessary and unavoidable presumption.

The last point is confined to the vessel, and resolves itself

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into the abandonment having been made too late, and after an acquittal. It will be sufficient on this, to remark, that whenever a legal right becomes once vested, and is exercised, subsequent occurrences do not affect it. On the capture, the plaintiff had a right to abandon; the acquittal of the vessel, as it does not appear to have been known when the abandonment was made, cannot invalidate the right. The only question, then, is, whether it was in due season. See *ante*, 53; *Muir v. Unit. Ins. Co.*, note (a)

On looking at the dates of the different circumstances, it will be found that there was an intervention of only 29 days from one period to the other. This, it is presumed, cannot be deemed too great a length of time, considering that the news of the capture must have travelled from the Bahama Islands to Charleston, and from thence to New York. Upon every ground, therefore, it is trusted the verdicts that have been rendered will be confirmed.

Pendleton, in reply. The cases of *Barlow v. Vowel*, *George v. Pearce*, and *Rez v. Fox*, proceed on this ground; that a person who is a witness shall not, by a subsequent act of his own, deprive others of the benefit of his testimony. (a) The principles of admissibility are no where better laid down than in *Omichund v. Barker*. (b) There is no instance of a person not a citizen by birth or naturalization, being held an American citizen; and as to the inference from his employ, he may qualify himself to be a master of a vessel by his own oath. None of our objections *have been answered. In particular, that against [*379] parol evidence of the register, for, if congress chooses to make it a record, this court cannot deny it all the privileges of one.

(a) That is the true point of the decisions.

(b) That case goes only to the admissibility of deists, not believing in the Christian religion. The proper question on this point is, "Do you believe in God, the obligation of an oath, and a future state of rewards and punishments." *Rez v. Taylor*, Peake, 11. See also *Rez v. Gilham*, 1 Esp. Rep. 285.

Peyton v. Hallett.—Same v. Delafield.

LIVINGSTON, J., delivered the opinion of the court. These are motions for new trials on the part of the defendants, and among the objections to the verdict it is alleged that George White who was examined for the plaintiffs, was an incompetent witness. This objection appears to me to be well taken[1] He was a creditor of the plaintiffs, who had given him an order on his agent, Thomas Napier, for the amount of his debt, to be paid out of the moneys to be recovered on the policies upon which those suits were brought, and had promised him the debt should be paid out of the same. This order was not accepted, but the witness said "he expected to be paid accordingly." He added, that whether the plaintiff recovered or not, he should look to him for payment, as his right did not depend on the event of the suit. Here was an interest, in our opinion, sufficiently direct, and dependent on the event of the cause in favor of the witness, to render him incompetent. The order he had obtained amounted to an assignment of this property to the extent of his demand; and the agent, after its exhibition to him would, at his peril, have parted with it to the plaintiffs, or to any other person. It is not a satisfactory answer to this difficulty to say, that White still retained his remedy against the plaintiff if this fund failed. If a bond be assigned, with a covenant on the part of the obligee or assignor that he will pay its amount in case it be not recovered from the obligor, would the court permit the assignee to be a witness in a suit on that bond? I think not; and yet I perceive no great difference in the cases. Nor will it answer to say that Napier may have had a right to appropriate this money in another way. This might have been shown on his examination; as this was not done, we are not now to presume it contrary to the expectations of the witness himself, which, no doubt, arose from promises made to him by the agent; for without some assurance of the kind, he would have abandoned *every

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[1] See Code of Procedure, sec. 393.

Peyton v. Hallett.—Same v. Delafield.

hope from that quarter. No doubt can be entertained of Napier's being the plaintiff's agent to recover this money. The bill was drawn on him to pay out of this fund, which implies an authority to receive it. He had the policies, for he made the abandonment, and the case itself gives him that appellation. It was also said on the argument that it was not certain the agent would ever receive these funds, and until that was the case, White could have no claim on them. For this very reason he had an interest to place them in the agent's hands, that his debt might be satisfied out of them. It is certainly dangerous to permit a person who has an interest, or who, on good grounds, thinks he has an interest, in a particular fund, to testify concerning it. In case of the insolvency of Peyton, there can be but little doubt that he might have compelled the agent in a court of equity, to pay his whole demand out of this money. 1 Vez. 332.

If a man promise a witness that if he recovers lands, he shall have a lease of them, this excludes his testimony. 2 Keb. 576. So, if a person be promised payment out of the sum in controversy, which is the case here, he ought to be excluded, unless he will release^(a) such interest. As that

(a) The principle on which a release makes a witness competent is, that it destroys his interest in the suit, or liability to the parties to it. When, therefore, it will not have that effect, the witness continues inadmissible; as a bankrupt under a second commission, though he release his interest in the estate, unless it has paid 15s. in the pound, for he has an interest in increasing his estate to that amount, in order to discharge his future effects. *Kennel v. Greenwoollers*, Peake's Cas. 3. So a person who appears from the testimony in the cause to be a partner with the defendant, but not sued, cannot, by a release from the defendant, be made a witness for him, because, though such release would discharge his contributory liability to the defendant at law, he would still, in case of the defendant's death or insolvency, remain liable in equity to the plaintiff. *Cheyne v. Koops*, 4 Esp. Rep. 112. Contra, *Young v. Bairner*, 1 Esp. Rep. 103. It follows, that when a witness is liable to the party for whom called, he cannot testify without a release from such party; as an owner of a house, called by a plaintiff who has done work upon it, to show that the defendant is liable, in virtue of a contract for a certain sum, to make all the repairs and pay the workmen: (*New v. Chidgoy*, Penke's

Peyton v. Hallett.—Same v. Dalasfield.

was not done here, the court is of opinion a new trial ought to be had, with costs to abide the event of the suit.

LEWIS, Ch. J. There is no difference amongst us in this cause, but on the point on which the court have set aside the verdict, viz. the competency of Mr. White, the witness produced on the part of the plaintiff. I do not concur in the opinion that he was incompetent. The bill drawn in his favor on Napier, the agent, has never been accepted, nor has the fund out of which it was to be paid, ever come to his hands. White, then, in my conception, had no interest in this fund. The doctrine of lien, has never, that I know of, been extended so far as to vest an interest in one man in a fund which may or may not come into the hands of another. Neither of the cases relied on go to such extent. In *Row v. Dawson*, Swinburn was in possession of the fund, and Lord Chancellor Hardwicke considered the bill of Gibson as an assignment to the amount of [*381] *the draft. In *Powel v. Gordon*, the witness was himself the agent who was to receive the fund, by

Cas. 98,) or a barge-master for a shipper, in an action for occasioning the loss of his goods by sinking the barge; (*Spilly v. Bowens*, *ibid.* 53,) or an owner of a ship to prove her seaworthy in an action against an underwriter; *Rotheroe v. Elton*, *ibid.* 84,) or a captain of a vessel, to prove for an underwriter, where the loss was stated to be by *barratry*, that the acts done were by the consent of the owners. *Bird v. Thompson*, 1 Esp. Rep. 339. Observe, that a release by one joint owner will extinguish the interest of all. *Hotchkiss v. Mitchell*, 4 Esp. Rep. 86. Where there is no liability, a release is superfluous; as to a servant, who merely delivers out goods, by his master when called to prove the delivery. *Adams v. Davis*, 3 Esp. Rep. 48. A grantor with warranty, on being released as to his covenants by his grantees, is competent to prove as well as disprove fraud in his deed. *Jackson v. Frost and Haff*, 6 Johns. Rep. 135. A late case has decided that a husband of a deceased wife may be a witness for her administrator on executing a release to him of all the witness's right, &c., in what might be recovered by the administrator in that suit. *Woods v. Williams*, 2 Johns. Rep. 193. If the doctrine in *Cheyne v. Krops* be law, there would seem to be an interest in the witness susceptible of release only by the defendant; the costs, if the suit were determined against the plaintiff, out of the estate of the wife, to which the husband was entitled.

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virtue of a special power for the purpose, and refused to let it go into the hands of another, which, had he assented to, would, we are to infer, have established his competence. In our case the power was in the hands of a third person already; and, therefore, within the spirit of the decision in *Powel v. Gordon*, White was a competent witness.

Now trial ordered.

THE PRESIDENT, DIRECTORS and COMPANY of the UNION
TURNPIKE ROAD *against* JENKINS.

THE SAME *against* THE SAME, in three other actions

The president and directors of a company, when legally chosen, are the proper persons to execute acts ordered to be done by the president, directors and company, and a promise to pay as the latter may order, is broken by not paying, according to the order of the president and directors. The interest acquired by subscribing for shares in the stock of an incorporated company, is a good consideration to support an action against the subscriber. The promise to pay in such cases as the president, directors and company may order, is not such a promise as will support an action for a promissory note. Where there are some good counts and some bad, and a general verdict on the whole, if the evidence has been on the good counts only, the verdict may be amended from the judge's notes, after notice of motion in arrest of judgment.

By an act of the 3d of April, 1801, (c. 118,) certain persons were incorporated, for the purpose of improving the road from New Lebanon to Hudson, under the name of "The President, Directors and Company of the Union Turnpike Road."

By the second section of the act, it is ordered "that Robert Jenkins and Elisha Williams be, and they are hereby appointed commissioners; to do and perform the several duties hereafter mentioned, that is to say, they shall, on or before the first day of May next, procure two books, and

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in each of them enter as follows : *We, whose names are here unto subscribed, do, for ourselves and our legal representatives, promise to pay to the President, Directors and Company of the Union Turnpike Road, twenty-five dollars for every share of stock in the said company set opposite to our respective names, in such manner and proportion as shall be determined by the said president, directors and company ; and every subscriber shall, at the time of subscribing, pay unto either of the said commissioners the sum of ten dollars for each share so subscribed ; and the said commissioners shall, as soon as one thousand shares have been subscribed, cause an advertisement to be inserted in the public newspaper printed in Hudson, giving at least ten days' notice of the time and place the said subscribers shall meet for the purpose of choosing five directors, who shall be stockholders, for the* [*382] *purpose of managing the concerns of the said company for one year ; and the day of choosing the said directors shall thereafter be the anniversary day of choosing directors ; and the directors elected by the votes of the stockholders shall immediately proceed to the choice of one of their members for president ; and the said president and directors shall and may meet from time to time, at such time and place as they may, by their by-laws direct, and shall have power to make such by-laws, rules, orders and regulations, not inconsistent with the constitution of this state or the United States, as shall be necessary for the well ordering of the affairs of the said corporation : PROVIDED, that at the election of the directors, every person shall have a number of votes equal to the number of shares owned by such person, if such number shall not exceed fifty, and one vote for every three shares owned by such person, exceeding fifty."*

By the last section it is enacted, "That it shall be lawful for the said directors to call for and demand of and from the stockholders respectively, all such sums of money by them subscribed, or to be subscribed, at such times and in such proportions as they shall see fit, under pain of fur-

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feiture of their shares, and of all previous payments made thereon, to the said *president, directors and company.*"

The defendant had subscribed for 280 shares, but, at the period of writing his name in the book, as directed by the first section, the 10 dollars therein ordained to be, at that time, paid, were neither so paid, nor were demanded. Two orders for paying in 5 dollars on each share subscribed, were made, with which the defendant refused to comply, and for their amount the present actions were brought.

The first count in the declaration stated the passing of the act, and incorporating the company. It also set forth the second section, omitting, however, that part requiring the payment of the 10 dollars on each share at the time of subscription; it went on averring the compliance with the requisites of that section, the subscription of the defendant, and of 2,900 shares; it stated the election of a *president and *directors*, and two orders made *by them*. [*383] for payment of two instalments of 5 dollars cash, on each share subscribed, notice, and by reason whereof, &c.

The second count was in these words: "And whereas also the said Thomas Jenkins, on the 7th day of April, 1801, at the city of Albany, in the county of Albany, made his *certain promissory note* in writing, by him, in his own proper hand-writing subscribed, the date whereof is on the same day and year aforesaid; whereby the said Thomas promised for himself and *his legal representatives* to pay to the President, Directors and Company of the Union Turnpike Road, the sum of 25 dollars for every share of stock set opposite to his name, *in such manner and proportion*, and *at such time and place*, as should be determined by the said president, directors and company; and the said Thomas did then and there set opposite to his name "fifty shares," with an averment of their determining that he should pay 5 dollars on each on the 10th of September then next, with notice liability and assumption.

The third count was in the same form on a promissory note, for 280 shares.

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The causes were tried at the Albany circuit, in January last, and general verdicts found for the plaintiffs.

After this the defendant gave notice of moving in arrest of judgment, and assigned the following reasons :

1st. That the first counts in the declarations in the said causes, being founded upon the statute, do not set forth that the said defendant *at the time* of subscribing the said subscription, paid to the said commissioners the 10 dollars on each share by him subscribed, according to the regulations of the said act, and that it appears by the said counts that the commissioners therein named did not, as soon as 1,000 shares were subscribed, in the manner directed by the said act, proceed to give the notice by the said act required, for the purpose of choosing directors, and that no order and determination of the president, directors and *company*, in the said declarations mentioned, is stated in the said first counts, for the payment of any money, [*384] upon the shares of stock therein mentioned to have been subscribed ; so that the defendant never became liable to pay any such money, and that the promises in the said first counts stated, are void for want of consideration.

2dly. That the second and third counts in the declarations in the said causes, are founded on agreements or promises in writing between the parties, as on a note of hand, which is not within the statute, &c. and that the said counts do not set forth any good or valid consideration, upon which the said agreements in writing were made and given.

Immediately after service of notice of the above reasons in arrest of judgment, on an affidavit stating that the evidence offered at the trial was under the first counts in the declarations, and calculated to support them in particular, (the second and third counts not being read to the jury, nor referred to by the counsel,) the plaintiffs gave notice of a motion to amend the verdicts in the several suits from the judge's notes, so as to make them apply only to the first

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counts in the several declarations, and to enter verdicts on the second and third counts for the defendant, and to amend the *postea* and rules for judgment entered thereon in conformity to such order as the court might make. Both motions (that for arresting the judgment and that for amending the verdict) were brought on together.

Champlin, for the defendant. The first objection is, that the ten dollars, ordered by the act to be paid, was not so done. The contract, then, on which the action is founded, is not according to the order of the statute. In the next place, the orders stated by the declaration to have been made for payment of the sums demanded, are not in pursuance of the law. By that, the order is to be by the president, directors and *company*; the declaration sets forth one by the president and directors only. This is fatal, for as the plaintiffs have a particular authority, they ought to show a strict literal compliance with the law by which they are authorized. If they have a right to omit the company in their orders, they may the directors, and so the president alone may govern the affairs of the corporation. The two last counts are plainly bad; they are on promissory *notes, under the statute, where those notes [*385] appear to depend on a contingency. The declarations, therefore, on them, cannot be maintained. *Carlos v. Fancourt*, 5 D. & E. 482. For a note on a contingency is not a note within the statute. Not that such a note cannot be declared on, but then it must be as special agreement, and the consideration set out. As to the notice to amend, it is before the court; they, perhaps, will not be disposed to allow it. We object, however, that the application is too late, because a term has intervened, and the evidence which was given in one count would equally apply to all. Yet if we are wrong in this, if the court should give leave to amend, they will not do it without ordering, at the same time, a new trial. *Tomlinson v. Blacksmith*, 7 D. & E. 132. (a)

(a) In that case the amendment was by altering the verdict from a small

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Williams and *W. W. Van Ness*, contra. The application on the part of the plaintiffs is to amend the verdict from the notes of the judge, so as to apply the evidence to the first count only, and to enter verdicts for the defendant on the second and third. It is evident that the testimony could have gone only to the first, for the two last are stated simply as contracts, though the form be somewhat like that on a note of hand. They were engagements to an organized company; and it was only in relation to *that* company that they were taken; they must, therefore, comport with the defendant's liability to that company, under the first count. When a general verdict is given, it is almost of course to amend, if *that* verdict does not correspond with the judge's notes. 3 D. & E. 659.(a) So in *Eddowes v. Hopkins*,(b) it was ruled that if the evidence be only on a good or consistent count, and there be others bad in point of law, a general verdict given on the whole declaration shall be amended according to the judge's notes. Even in a criminal case it has been done, and the criminal executed according to the amendment. *Grant v. Astle*, Doug 722.

In slander, it is true, where some counts are for words not actionable, and others for words actionable, on a general verdict, judgment will be arrested, but even then [*386] the *court will order a *venire de novo* (*Beedle v. Hopkins*, ante, 347,) to assess damages on the good count. An application like the present is never too late. In 1 D. & E.(c) it is said an amendment will be ordered even after

to a larger sum; which amendment was moved for, on the face of the declaration. The court said, in fact, we cannot load the defendant with more than the jury of his country has determined, without sending him back to another jury.

(a) *Petrie v. Hinnay*. There were two issues in that case; the verdict was on one, and no notice taken of the other; the amendment was allowed after error brought, and this assigned as a cause, on payment of costs.

(b) Doug. 377. See also *Williams v. Breaden*, 1 Bos & Pull 329.

(c) *Green v. Rennot*, 783, per Buller, J. But that case does not apply to amendments of verdicts. It relates to amending mistakes by the act of the clerk, where there is something to amend by. As if he enter against an executor judgment *de bonis propriis*, instead of *de bonis testatoris*.

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error brought, (a) and the record sent back from the exchequer chamber. The same principle is found in *Taylor v. Whitehead*, Doug. 746. (b) If we are successful on the point of amendment, all objections taken to the second and third counts are at an end. But even should these be objected to, we contend they are good. The instrument declared on is an engagement in writing by which the defendant promised to pay. The being a note in writing is enough, and purports a consideration, though none be stated. 2 Bl. Comm. 446. *Pillans v. Van Merop*, 3 Burr. 1670. (c)

(a) In *Dumond v. Carpenter*, 2 Johns. Rep. 184, the court allowed an amendment by suggesting the death of one of the defendants below, after error brought, and the death of such defendant, before the entry of interlocutory judgment, assigned for error. See *Richards v. Brown*, Doug. 114. *Hamilton v. Holcomb and others*, 1 Johns. Cases, 29.

(b) The decision referred to is very different. A verdict had been found for the defendant, a motion for a new trial on account of the verdict's being against evidence had been denied, after which the plaintiff obtained a rule to show cause why he should not be allowed to enter up judgment on that issue, because, notwithstanding the finding of the jury, the point of law was in favor of the plaintiff. The court said this being a motion in the nature of one for an arrest of judgment, was never too late before judgment entered up.

(c) The two books cited will certainly warrant the position of the learned counsel, but the parts referred to are not law. In *Sharlington v. Strotton*, (Plowd. 358,) it is said, "By the law of this land there are two ways of making contracts or agreements for lands and chattels; the one is by words, which is the inferior method; the other is by writing, which is the superior. And because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. But where the agreement is by deed there is more time for deliberation; for which reason they are received as a lien final to the party, and are adjudged to bind the party without examining upon what cause or consideration they were made." The reader will observe that when Plowden speaks of contracts by writing, he means by deed under seal. This is more explicitly declared in the case of *Rann v. Hughes*. Baron Skynner there says, "All contracts are, by the law of England, distinguished into agreements by SPECIALTY, and agreements by PAROL: nor is there any such third class as some of the counsel have endeavored to maintain, as contracts in writing. If they are merely WRITTEN, and not SPECIALTY, they are PAROL, and a consideration must be proved." In *Pillans v. Van Merop*, Wilmut, J., argued, that if a stipulation, which was only by words, was, according to

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KENT, J. That doctrine has been completely overruled in a case where *Skynner*, Baron, delivered, in the house of lords, the unanimous opinion of the twelve judges. *Rann v. Hughes*, 7 D. & E. 350.

[*387] **Van Ness*. A written contract, without consideration, may be declared on as it is.

LEWIS, Ch. J. This court has decided that a contract merely in writing, does not supersede the necessity of a consideration.

Williams. That the contract was not consummated by payment of the 10 dollars required by the act, is also urged as a reason why the action cannot be maintained, but surely the commissioners might have dispensed with this. As to the objection that the promise was given to pay such sum as the president, directors and company should order; and that the order was only by the president and directors, it can hardly be thought the defendant ever hoped to rely

the civil law, binding without consideration, *a fortiori*, so must be an agreement in writing. But the civil law itself will not warrant this reasoning. The obligatory force of a stipulation arose from the words being spoken in a precise form, before a public officer; for if that form was not adhered to, the stipulation was void; therefore, if to the question *PROMITTIS*, the party stipulating had answered *SPONDEO*, the stipulation was a nullity. I am, therefore, disposed to think that the stipulation was taken in the manner of our recognizances, and, when acknowledged, became a species of record. I am peculiarly induced to this opinion from the manner in which they are now entered among the acts of the court, in those of the English tribunals which follow the civil code; and also from considering, that the reduction of a contract into writing did not, even by the rules of the Roman jurisprudence, preclude from entering into the consideration on which it was made. By that system the *obligatio literarum*, arising from the contracts *ex literis*, was invariably contestable in the three following cases: 1st. When the consideration was not expressed; 2d. Even then within two years; 3d. In all cases of loans of money, by the *exceptio de non numerata pecunia*, which threw the onus of proving a consideration upon the plaintiff. The *Codex*, too, is express that no form of words or writing, but assent alone, formed the contract. *Cod. lib. 2, tit. 8, 1, 17.*

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upon it. The president and directors are the agents of the company, duly chosen by them to physically and legally express their will. The order made by the president and directors, is an order made by the company. This follows necessarily, for the president and directors are, by the words of the law, to manage the concerns of the company, to act; when they were chosen, the powers of the company to act were transferred to them, and this being under the letter of the statute, they were the only persons to make the order. Had it been complied with, the defendant would never again have been called upon for any thing paid under it.

Harrison, in reply. In support of the notice in arrest of judgment, nothing can be more clear than that where entire damages are given, and one count is bad, the judgment must be arrested. But in this declaration there is not one good count, and this is apparent on the face of the record without any aid *aliunde*. On the first count the objection as to the order is certainly fatal. The act operating like a charter, specifies a particular manner in which *the orders or the subscribers are to be made; the [*388] by laws of the company are not to oppose the laws of this state, or the laws of the union; and yet, supposing the company to have authorized the president and directors to make orders on the stockholders, that very authority can be supported only by allowing a violation of the law itself by which the company is incorporated. If one branch of those by whom a specific act is ordered to be done, can be dispensed with, another may, and there is no saying how far this principle is to be carried; no power can be exercised under the statute but what is created by it, and executed in the manner it prescribes. On the point of consideration, the authority from 5 D. & E. is decisive; no consideration appears by the declaration. The amendment asked must be denied, because it is evident whatever went to support the first count, must have been applicable to the second and third counts, which were on the same note as that men-

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tioned in the first: if so, *Eddowes v. Hopkins*, relied on by the plaintiffs, shows the amendment cannot be granted.

RADCLIFF, J. delivered the opinion of the court. In this case there is a motion in arrest of judgment, founded on objections made to all the counts in the declaration.

The counts are three in number, and the objections which apply to all are,

1st. That the promise or contract set forth in the declaration is void for want of consideration, and connected with this is another objection, which was distinctly urged, that the first instalment of 10 dollars not being paid, the contract was incomplete, and not obligatory on the company, and therefore also void.

2d. That the commissioners appointed by the act did not, as soon as 1,000 shares were subscribed, give the notice required by the act to choose directors.

3d. That no order or determination of the president, directors and company, requiring the payment of the instalment in question, is stated in the declaration to have been made.

[*389] *4th. To the second and third counts there is a further objection, that the plaintiffs have declared on the promise or subscription in writing, as upon a promissory note within the statute.

As to the first, the form of the subscription which contains the promise, is prescribed by the act in the following terms: "We, whose names are hereunto subscribed, do for ourselves and our legal representatives, promise to pay to the president, directors and company of the Union Turnpike Road, the sum of 25 dollars for every share or stock in said company, set opposite to our respective names, in such manner and proportion, and at such time and place, as shall be determined by the said president, directors and company." The declaration states the plaintiff's subscription in these terms, but does not aver that the 10 dollars

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on each share were paid, and which the act required the defendant to pay at the time of subscription.

We cannot discover any ground on which this promise ought to be considered as void. The subscription was taken by commissioners who were authorized to receive it, and in the form prescribed by the act. That form contains an absolute promise to pay the money to the president, directors and company. On the one side, the interest of the company in selling the shares, and the public advantage to be derived from the success of the institution ; and on the other, the expected profits to accrue from the stock, were sufficient considerations to uphold the promise. By force of the act itself, also, it must be considered as good. The legislature also must have intended that it should be obligatory, for else the formal manner in which it was prescribed to be taken would be senseless and nugatory. We cannot imagine that a contract in terms so express and complete should be designed to mean nothing.

The last section of the act by which the company was created, cannot, in my opinion destroy its effect. It is thereby further enacted, that the directors may call for and demand the sums so subscribed, at such times and in such proportions as they shall see fit, under the pain of the forfeiture of the shares and all previous payments. This provision was *designed as an additional security for the proportion of the shares which should remain unpaid, and to enable the company, by a decisive measure, to compel the prompt payments which the objects of the institution required. They had an election to adopt this expedient, and exact the forfeiture, or to enforce payment in the ordinary course by a suit on the original contract. Not having insisted on the forfeiture, they, of course, have a right to maintain this action.

The objection which is founded on the idea that the contract was not obligatory on the company, and, therefore, not mutual in its operations, we also think is not well taken. The subscription was for the full sum originally due for

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each share. The 10 dollars on each share were due immediately, and the engagement with respect to that sum was like a note or obligation payable on demand. The contract was complete, and the defendant had a right to tender the payment of the 10 dollars, and demand its performance on the part of the company, who had an equal right to enforce it against him. Neither party could revoke it without mutual consent, or a default on the adverse side. We, therefore, consider the contract as reciprocally binding, and founded on a valid consideration.

The second objection is, that the commissioners appointed by the act did not, as soon as 1,000 shares were subscribed, give notice to the stockholders to choose directors. This was, we think, properly relinquished by one of the defendant's counsel. It does not appear when the precise number of 1,000 shares was subscribed. The defendant subscribed his shares on the 17th of April, 1801, and it is averred, that on the 21st of the same month upwards of 1,000 shares, to wit, 1,990 were subscribed, and that the commissioners on that day, gave notice to choose directors. The particular time of giving this notice, after 1,000 shares were subscribed, could not be material. The act in this respect was merely directory to the commissioners, and if they did not strictly execute their trust, it could not affect the existence of the company, nor any contracts made with them.[1]

[*391] *The third objection is, that no order or determination of the president, directors and company, requiring the payment of this instalment, is averred. It is averred that the *president and directors only* made the order. The promise was made to the president, directors and company, according to the form prescribed by the act, and it is therefore, argued that this order ought to have been made by the *company*, as well as by the president and directors. This criticism ought not to prevail against the

[1] See *Fire Department v. Kip*, 10 Wen. 266; *McFarlan v. Triton Ins Co.* 4 Denio, 392.

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only practicable construction that can be given to the mode of executing the powers of this corporation. It is obvious that the company in their collective capacity, can never act. The president and directors are their representatives, and they alone are authorized to manage the concerns of the company. The act invests them with this power, and it is thus set forth in the declaration. They alone could require the payment in question, and the order was properly made by them.

4th. The last objection applies to the 2d and 3d counts only, in which the plaintiffs have declared on the defendant's subscription as upon a note of hand, without setting forth the act or any consideration to support the defendant's promise. It is not expressly declared upon as a note within the statute concerning promissory notes, but the counts can be supported on that idea alone, for they do not state any consideration independent of the making of the note. The shares of stock to which the defendant would be entitled, are not set forth as the consideration of the promise, but merely as descriptive of its extent, and as designating the amount he undertook to pay. These counts, therefore, cannot be maintained unless the note be considered to come within the statute, which we think it does not. Although by the note the defendant promised to pay 25 dollars for each share, it depended on the future operations of the company, which was not yet organized, whether the whole or any part of that sum would finally be demanded or become due. The payment was, therefore, uncertain and contingent,^(a) and such a note has frequently *been held not to come within the statute, and can [*392] be declared upon only as special agreement

(a) The payment of a bill or note must be absolute, and at all events, independent of any uncertainty or contingency. See *Kingston v. Long*, Raym. 8; *Appley v. Bidulph*, 8 Mod. 362; *Roberts v. Peake*, 1 Burr. 323; *Beardsley v. Baldwin*, 2 Stra. 1151; *Pearson v. Garrett*, Comb. 227; *Haydock v. Lynch*, 2 Ld Raym. 15 3. The distance of time at which the payment is to be made is immaterial, if on an event which must necessarily happen; as six weeks after the death of the defendant's father; (*Cooke v. Colehan*, 2 Stra

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These counts being, therefore, defective, and the verdict general, the judgment ought to be arrested, (a) unless the verdict be amended by applying it to the first count in the declaration. An application for that purpose was made by consent, concurrently with the motion in arrest of judgment. And if the judge, before whom the cause was tried, will certify that the evidence applied solely to that count, or, as we apprehend the correct rule to be, that all the evidence given would properly apply to that count as well as to the others, we think the amendment ought to be allowed. (b) The practice of amending in such cases is well established, and is consistent with reason and justice to the parties. (c) The result of our opinion, therefore, is, that the judgment be arrested, unless such amendment be made, and in that case that the motion be denied.

LEWIS, Ch. J. These are actions of *assumpsit* brought by the president, directors, and company of the Union Turnpike Road against the defendant Thomas Jenkins, on two several subscriptions amounting to two hundred and

1217;) and events of a public nature for which the faith of government is pledged, are deemed moral certainties, and not contingent; as the paying off a ship of war. *Andrews v. Franklin*, 1 Stra. 24; *Evans v. Underwood*, 1 Wils. 262.

See also *Worden v. Dodge*, 4 Denio, 159; *Ketchell v. Burris*, 24 Wend. 456; *Dutchess Cotton Manufacturing Co. v. Davis*, 14 J. R. 238; *Goshen Turnpike Co. v. Hatin*, 9 J. R. 217.

(a), *Buyard v. Malcolm*, 2 Johns. Rep. 550, and, *quære*, what the law is now?

(b) See *Elliott v. Skrypp*, Cro. Car. 338; *Williams v. Jones*, Barnes, 6; *Hankey v. Smith*, *ibid.* 449; *Newcombe v. Green*, 2 Stra. 1197; *Doe v. Perkins*, 3 D. & E. 749; *Bois v. Bois*, 1 Lev. 134; *Bold's Case*, Salk. 53; *Halloway v. Bennett*, 3 D. & E. 448; *Bolde v. Walter*, 1 Roll. Rep. 82; *Petrie v. Hannay*, 3 D. & E. 659.

See also *Ricket v. Snyder*, 9 Wend. 416.

(c) See *Holt v. Scholefield*, 6 D. & E. 695, where Lawrence, J., says, if the evidence apply to the bad as well as the good counts, the amendment from the judge's notes cannot be made, because (per Buller, J., in *Eddowes v. Hopkins*, Doug. 377) "it is impossible for the judge to say on which of the counts the jury had found the damages, or how they had apportioned them."

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eighty shares in the capital stock of said company, for certain payments called for, pursuant to the act of incorporation, by the said president and directors.

The declaration contains three counts. The 1st sets forth the act of incorporation, the formation of the company pursuant thereto, the subscription of the defendant, the call for certain payments of seven dollars on each share, and his refusal to pay, whereby he became liable, &c.

The two remaining counts are on the several subscriptions of the defendant, as on his promissory notes.

A verdict was found generally for the plaintiffs, and the cause is now before us, on a motion in arrest of judgment, on the part of the defendant, and a motion, on the part of the plaintiffs, to amend the verdict by the notes of the judge who tried the cause, so as to confine it to the first count in their declaration, on an affidavit that no evidence was offered on the other counts.

*The principal ground of the motion in arrest of [*393] judgment, is the alleged want of a consideration to support the promise without which, it is insisted, the action is not sustainable. On the record no consideration is stated; no loss or gain to either party; and, testing the conduct of the commissioners by the provisions of the act none is to be found, in my opinion, in the contract itself. The act requires that to constitute a stockholder, he shall subscribe an engagement in the words following: "We, whose names are hereunto subscribed, do, for ourselves and our legal representatives, promise to pay to the president, directors, and company of the union turnpike road, the sum of twenty-five dollars for every share of stock in the said company, set opposite to our respective names, *in such manner and proportion, and at such time and place, as shall be determined by the said president, directors, and company.*" It also further requires, that every subscriber shall, at the time of subscribing, pay unto either of the commissioners the sum of ten dollars, for each share so subscribed. The

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Subscription and payment are both essential to the consummation of the contract. These were cotemporaneous acts.

The declaration states the subscription by the defendant merely, without averring any payment or demand of the ten dollars on each share; and it was admitted, on the argument, that, in fact, they were neither demanded nor paid.

I cannot see, then, any consideration for this promise; and the legislature appear to have been apprised of the inconvenience that might arise from this source, and have provided for it, in some measure, by the last clause in the statute, which gives a power to the directors "to call for, and demand, of and from the stockholders respectively, all such sums of money by them subscribed, or to be subscribed at such times, and in such proportions, as they shall see fit, under pain of forfeiture of their shares, and of all previous payments made thereon."

Suppose the speculation had been an advantageous one, and before the first call of the president and directors, the stock had risen considerably in value, could not [*394] the directors, *with propriety, have refused to consider Mr. Jenkins as a stockholder, on account of his not having made the payment required by the act on his subscribing? I think they could. No *positive* benefit, then, arising from the future emoluments of the company transactions, can be considered as a consideration for the promise, and if it could none such is stated on the record.

Notwithstanding the motion to amend, it was insisted the suit was maintainable on the 2d and 3d counts. I think not. For a promise to pay on a contingency, which may, or may not happen, cannot be declared on as a note of hand. The instrument must be *payable at all events*.

The propriety of amending I need not consider, as I am of opinion, no suit can be maintained on the first count for want of a consideration.

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I am of opinion judgment ought to be arrested.(a)

Motion to arrest the judgment denied; that for amendment granted.(b)

THE PEOPLE *against* FREER.

If a defendant has been prevented by adverse winds, from showing cause against a rule for an information, and the same has been made absolute for want of cause shown, the court will set it aside of course, on an immediate application.

A RULE had, in the last term, been granted against the defendant to show cause, on the first day of the present term, why an information should not be filed against him, and no cause having been shown on the day appointed, the rule was made absolute.

Hoffman now stated to the court, that the defendant had been prevented by adverse winds, which detained himself counsel and papers, until after the rising of the court on the first day of the term,(c) and prayed that the rule might be enlarged.

Per Curiam. It is of course; take your motion, but show cause on the first non-enumerated day.

Motion granted.

(a) After pronouncing the judgment of the court. Radcliff, J. observed, that he thought the regular practice was to obtain the certificate of the judge before whom the cause was tried, that the evidence applied only to the count on which it was meant to enter judgment. Kent, J., who tried the cause, said, the affidavit of the plaintiff's attorney was correct, and therefore he deemed it sufficient for the amendment. In this the bench concurred.

(b) Judgment reversed, (1 Caines' Cases in Error, 86,) on the ground taken by Lewis, Ch. J., as to the first count.

(c) See *The People v. Van Wyck*, 2 Caines' Rep. 334.

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BRANDTER, *ex dem.* FITCH and others, *against* MARSHALL.

If a tenant enters under a lease, holding over after its expiration, is not evidence of adverse possession. So, if the tenant's son come in under him

EJECTMENT for lands in West Chester, tried in June, 1801, before the Chief Justice. The case stated that the plaintiff produced and proved :

[*395] *1st. A paper signed Joseph Marshall, the father of the defendant, dated 6th September, 1758, by which he acknowledged that he had, about six years before that period, taken possession of the land in question, under Thomas Fitch and John Raymond, and that he then held the same under them as his landlords.

2dly. The counterpart of a lease executed by the said Joseph Marshall, by which the said Thomas Fitch, and John Raymond demised to him the premises, for three years then next ensuing, at a reserved annual rent of one shilling, of any payments of which no testimony was given; but it was given in evidence, that some time subsequent to the lease, two suits for forcible entry and detainer were brought against the said Joseph Marshall, relative to the land in question, and that, on these occasions, Joseph Marshall applied to Thomas Fitch, who defended him therein; that he was turned out of possession in one of those suits, but afterwards restored; that Joseph Marshall died intestate in 1774, and letters of administration were granted to his son Joseph; that Joseph Marshall, the father, died in a house on the premises, in which he resided with several of his sons, who were of age, and had, for some years past, worked the farm; but whether on their own account or that of their father, did not appear.

It was further proved, by two witnesses, that they were present at a sale by auction of the effects of the intestate, when they were told by the administrator and auctioneer,

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that the defendant had purchased the *possession* of the land in question.

One of the witnesses, who was a neighbor of the defendant, deposed, that, according to his supposition, the defendant held the lands ever since by virtue of the purchase; and another proved that he was the youngest son of the intestate, and not his heir at law. It was also in evidence, that the defendant had in his possession the lease granted to his father; that Thomas Fitch died in 1775, and some of the lessors of the plaintiff are his heirs. On the part of the defendant it was established, that he had been in the actual and peaceable possession of the premises from the death of his father to the present time, holding
*and claiming them as his own, and that no rent [*396]
had ever been paid by, or demanded from, him.

The judge, on this evidence, charged the jury, that if they believe the defendant hold the land under his father's title, they ought to find for the plaintiff; on which direction the jury brought in their verdict accordingly.

On these facts a motion was made for a new trial

Hoffman, for the defendant. We contend that on the circumstances, as presented by the case, the judge ought to have directed for the defendant, and not for the plaintiff. The facts, indeed, are but limited; some principles, however, are involved, which it is of the utmost importance to have decided. For, admitting that the defendant claimed under his father, still, we insist, the plaintiff, as appears from the case itself, is not entitled to recover. There is no evidence of title whatsoever from the expiration of the lease in 1758. That, then, being only for the years, expired in 1761. After 1761, the lease is no evidence of a possessory right in the plaintiff to have the premises, unless subsequent acts of the defendant can be shown equivalent to an acknowledgment that his title was under the lease. Without resorting to authorities, principles of law will bear out the position. The lessor's right commenced

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In 1761. It was incumbent on him then to have entered, or have exacted some acknowledgment, which rendered the entry unnecessary. He was out of possession for 40 years without receipt of rent or profits; if his right did then accrue, and was not pursued, the defendant remaining in quiet possession,^(a) the court will not intend he held under the present plaintiffs. For the holding was tortious, against their right. If this be not so, where is the doctrine of the opposite side to carry us? If it be acceded to, any one *entering* under a lease, is it for ever to be supposed to hold under it; 200 years' quiet possession might be shown, and yet no title acquired. To evince that when the lease determines, the plaintiff should have entered, Runn. on Eject. 60, is fully in point. "Nor is a common person affected by the statute of limitations, where the possession is in the hands of his tenant, who has paid him rent within [*397] the *time of limitation; for the possession of a lessee for years is the possession of his lessor, and payment of rent is an acknowledgment of the possession. So that during the continuance of the lease, and payment of rent, the lessor is in no sort of default, for he cannot enter and take the *actual* possession till the lease be expired; but *then*, it seems, he should, because his right of entry *then* first accrues." The court will find the same principle recognized in *England v. Slade* 4 D. & E. 682. It was there ruled, that a man entering under a lease cannot, pending the term, contradict his lessor's title, but after the time has expired, he may prove his landlord not entitled, by producing the lease; in which case, the landlord must show a better title. The lease, therefore, given in evidence, only shows a right of possession against us till 1761, and

(a) Where the copyholder for life, remainder in fee to another, surrenders the whole estate, (by which he lets in the remainder,) and takes a new estate to himself and others, it seems a holding over by him, for more than 20 years, would be a bar in ejectment by the remainder-man *Doe v. Read*, 8 East 353. But observe, that in such a case, the copyholder takes under the lord and paramount the remainderman.

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no longer. Even for that time, no rent was paid, and it is to be observed, that the reservation was merely nominal. But the fact really is, that *none ever was paid*. It is next to be observed, that the jury were not warranted in finding the son took under his father. There is no evidence of this fact. The defendant might have taken as a stranger, and then this lease would have been totally out of the question, because he would have come in as a third person, and not affected by it. He was also the youngest, and not the eldest son. The testimony that he did derive title under his father, is hearsay throughout, and, therefore, the judge ought to have charged that it was not entitled to any credit. The auctioneer, and some one else, told the witnesses that the defendant had purchased the possession; but this was not done in his presence, nor is any acknowledgment of the fact substantiated: the declaration was made by a third person, and never assented to. This, surely then, cannot be evidence. On the contrary, the testimony in behalf of the defendant demands a presumption that he held adversely, and so the judge ought to have charged: it ought to have been laid down to the jury, that there was sufficient for them to presume an adverse holding. The principle of this doctrine has been recognized in this court, in *Van Dyck v. Van Beuren & Vosburg*, ante, 89. That *was a case of tenancy in common, and [*398] yet there the court said, after 40 years' possession by one tenant in common, the jury ought to have been directed to presume an ouster. If, then, this be law between tenants in common, *a fortiori* between others. It is impossible here to presume otherwise, for could it be so, the doctrine would extend *ad infinitum*, and a lease once shown, would be an argument for holding under it for ever. The inconvenience this would lead to, ought to be an argument against it. The plaintiff, therefore, should have shown, as his lease had expired 40 years ago, a title paramount; for it is possible neither party have a right.

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Harrison, contra. It has ever been a principle of law, that where a person enters under a title from another, the person so entering never can dispute the right of the original holder. So where the relation of landlord and tenant has subsisted between the parties, though there should be a holding over, the tenant, in an action against him, cannot contradict the title of the lessor.^(a) If this be a mistake, it is so in the very foundations of the law. For the general principles thus stated, and to show that a lessee cannot dispute the title under which he has entered, the court will find an authority in 2 Black. Rep. 1259.^(b) These positions are not altogether denied by the counsel for the defendant, but they are qualified by saying, when the lease expires, if the party entitled to the possession does not enter, the relation of landlord and tenant is at an end. Surely, however, if the lessee, on the expiration of his term, continues to possess, by the tacit consent of his landlord, he is tenant at will, or at least from year to year accountable for the

(a) Because the tenancy is held to subsist, the holding over amounting to a tacit agreement that the original contract shall continue, *Beavan v. Delahay*, 1 H. Black. 8, subject, however, to be determined on regular notice; *Right v. Darby*, 1 D. & E. 162. Therefore, though the rent be withheld for more than 20 years, *Roe v. Ferrars*, 2 Bos. & Pull. 542, or the possession by, or under the tenant endure for 100 years, it is not a disseisin, nor an adverse holding, upon which the statute of limitations will run; Bull. N. P. 104, because it is in suberviency to, and consistent with, the title of the landlord. On the same principle a receipt of the rents and profits, for more than 20 years, on an estate the legal title of which is in trustees, for the purpose of sale, cannot be set up against the trustees, or those claiming under them, if such receipt be consistent with, and secured by, the deed of trust; *Keene v. Deardon*, 8 East, 248, nor an outstanding title in a third person, by a party who has entered under the lessor of the plaintiff; *Jackson v. Stewart*, 6 Johns. Rep. 24, nor, after an acknowledgment of tenancy by a defendant, can he dispute his landlord's title; *Jackson v. Vosburgh*, 7 Johns. Rep. 186, consequently, an admission by a defendant, that he went into possession under one of the lessors of the plaintiff, is sufficient to entitle to a recovery. *Jackson v. Dobbin*, 3 Johns. Rep. 278. Whether there be a tenancy or not, is matter of fact for a jury. *Jackson v. Vosburgh*, *ubi sup.* Qu. *tamen*, if it be a deduction from acts done.

(b) *Doe v. Lawrence*. In this case the lessee who was the defendant, had paid rent to the lessor of the plaintiff.

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value of the rent, when the owner may think proper to demand it. But he may lose his right to the rent, by neglecting to apply for it within six years. On examining the doctrine in *Runnington*, it will be found to apply merely to leases taken by third persons. Where the lessee parts with the land, if he pays rent, still the statute does not run. This is not the case of lessor and lessee, but of an assignee of a lessee. The decision in 4 D. & E. will be seen to have settled only that *where a person enters [*399] under a landlord, it shall be competent in him to show that the title of the landlord has terminated, and that the landlord himself held by a lease which has expired.(a) If this had been so, then it might have been shown that Fitch himself held only as lessee. But till shown it cannot be presumed, for in all cases the presumption of law is, that the party under whom the holding is, has a fee. See *Stokes v. Berry*, 2 Salk. 241. Therefore, unless it be shown to the contrary, it must be taken that Fitch had the fee, and the party continuing in possession held under that fee. Should this be the law, it is asked, what becomes of the statute of limitations? This brings it to the question, whether the statute applies when the possession is not adverse? The whole of the facts stated by the case, show no more than a holding by sufferance, and, under such circumstances the statute does not apply. For though 100 years may have elapsed without payment of rent, or any acknowledgment, it is immaterial if the first entry was by the landlords consent, as no tenancy by sufferance is adverse, and in adverse cases only does the statute of limitations run. In *Bishop v. Edwards*, Bull. N. P. 103, 104, the court will find the whole of these positions laid down. As to the reservation of the rent being nominal, the value is immaterial; a pepper corn would be sufficient to create the relation between landlord and tenant. If this be right, the relation did subsist, provided the son entered under the father, as holding by his title. This is a question of fact,

(a) The case is exactly so.

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and, as in all other cases, the jury were at liberty to infer either for or against. What, then, are the circumstances here? The father enters into possession under the lessors of the plaintiff, lives in the house, cultivates the land with his sons, who, in his old age, do so likewise, and on his death, continue in the same course. On this is a disseisin to be supposed? Is it not more reasonable to imagine the sons preserved the tenure, and held as their father had done? It is said, however, that this could not be, because in such a case the eldest son would have taken. True, had there been a disseisin, because then a fee would [*400] have been acquired. But as the title to the premises was a chattel interest, it passed to the personal representative, and, therefore, it was properly left to the jury to determine, whether, on the facts of the sale by the administrator, the defendant did not enter under his father's title. To say that the court and jury ought not to presume on facts, when they all lead to one point, would be an outrage to common sense; it might, perhaps, be thought, that if it was so, notice to quit was necessary. But when the defendant disclaimed to hold under the plaintiff, notice was unnecessary, and, therefore, an ejectment was brought. Admitting the case of *Van Dyck v. Van Beuren & Vosburg* to be as stated it only shows, there was, from the circumstances, enough to suppose an *ouster*; but here, the reverse is the fact, and, therefore, we contend the charge and verdict were equally right, and a new trial must be refused.

Hoffman, in reply. That a jury may infer from circumstances is not disputed; but then there must be legal evidence of those circumstances before the court. That which was given was inconclusive; it rested on hearsay, and ought not to have had any weight with the court. The sale of the premises was merely hearsay, and it is to be observed, that the vendue was of personal estate, as if land was totally out of the question: the lease so much relied



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on, expired in 1761. Had we then disavowed holding under the lessor of the plaintiff, the statute would have run. Can there be a stronger disavowal, than taking to ourselves the rents and profits for forty years? After thirty years the law will intend an adverse possession. It is not reasonable that a proprietor should permit a person to go on for forty years improving, and then set up an old dormant lease, after laying by so long. The jury ought to have been directed to presume an adverse holding, for the instant we are called upon, we assert our own right, and deny that of the lessor. On the grounds contended for by the plaintiff, had the lease been dated on the day of first taking possession of this country by the British, it would have been equally efficacious. The interests of the community require a different doctrine; if for no other reason, the plaintiff ought to *show a title beyond the [*401] lease. Improvements have been made, and this, connected with a forty years' exclusive enjoyment of rents and profits, ought to have induced from the judge a charge to the jury, that an adverse possession was a presumption of law, and on which they ought to find.

LIVINGSTON, J. delivered the opinion of the court. This is a motion for a new trial for misdirection of the judge, and because of the verdict being against evidence.

The chief justice charged the jury, that if they believed the defendant held under his father, they should find for the plaintiff, which they did accordingly.

This direction and finding of the jury were both correct.

When a person enters under another, and transfers the possession, his grantee is supposed to hold under the same title. Although the lease be expired, he will be regarded as holding by consent of the original landlord, and as his tenant at will; unless he can show that since the expiration of it, he has acquired a new title, either from, or paramount to that of the party under whom possession was

*taken. Joseph Marshall, the father, it is admit- [*402]

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ted, held under Fitch. He, therefore, under this rule, would not, on his mere possession, be permitted to prevail against the title of one, acknowledged by himself.[1] The presumption that he continued to hold under Fitch is a reasonable one, nor would it work any hardship to him, as it would not preclude him from showing a better title, when he had continued in so long after the lease had expired. The possession, therefore, in 1774, when Joseph Marshall died, must be considered as that of Fitch. The next question relates to the proof of the present defendant holding under his father. The testimony was sufficient to go to a jury and we think they have drawn the proper conclusion.

The defendant is not only his son, but the contemporaneous declarations of the vendue master and administrator, although not in the hearing of the defendant, were properly admitted, and unless the defendant produced some other title, would satisfy any reasonable mind that such was the case.

There can then, be no adverse possession; for until 1774, Joseph Marshall did not set up, for aught that appears, any title adverse to that of Fitch, and since that time twenty years, deducting the period of the British war, have not elapsed. The rule, therefore, for a new trial must be discharged, with costs, and the plaintiffs have judgment.

New trial refused.

NASH *against* TUPPER.

On foreign contracts, our statute of limitations is a good plea.

THIS was an action on two promissory notes, made in the state of Connecticut, and dated 28th November, 1791.

[1] See *Fauling v. Schenck*, 3 Hill, 344; *Brant v. Ogden*, 1 J. R. 156, *Jackson v. Parker*, 3 J. C. 124; *Jackson v. Sharp*, 9 J. R. 163; *Jackson v. Waters*, 12 J. R. 365; *Jackson v. Thomas*, 16 J. R. 293; *Jackson v. Camp*, 1 Cow. 805; *Jackson v. Scissam*, 3 J. R. 499; *Jackson v. Reynolds*, and note [1] *post*, 444.

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The plaintiff declared in the common manner, adding a count for money had and received.

The defendant pleaded *non assumpsit* and *actio non accrevit infra sex annos*.

The plaintiff replied specially, as follows: " And the said William, by his attorneys aforesaid, says, that he, by anything by the said Samuel above secondly in pleading alleged, ought not to be barred from having and maintaining his action thereof, against the said Samuel; because *he says, that the two several promissory notes, [*403] mentioned in the two first counts of his, the said William's declaration, were made and given by the said Samuel to the said William, and that the cause of action in the two first counts of the same declaration mentioned, arose within the limits and jurisdiction of the state of Connecticut, and was contracted with reference to the laws and customs of the state, to wit, at Whitestown, in the county of Oneida; and the said William says, that by an act of the legislature of the state of Connecticut, entitled, An act for the limitations of prosecutions in divers cases civil and criminal, amongst other things it is enacted, That no suit, process, or action shall be brought on any bond, bill, or note under hand, given for the payment of any sum or sums of money, not having any other condition, contract or promise therein, but within the space of seventeen years then next, after an action on the same shall accrue. And the said William avers, that by the law of the said state of Connecticut above recited, the said William, at the time of exhibiting his said bill against the said Samuel, to wit, on the nineteenth day of January, in the year of our lord one thousand eight hundred and two, had a good and sufficient cause of action against the said Samuel, as contained in the two first counts of this said declaration, and this he is ready to verify; wherefore he prays judgment if he ought to be barred from having and maintaining his said action thereof against the said Samuel; and the said William here freely in court confesses, that he will not further prosecute his action against

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the said Samuel, of, and upon the third count in his declaration aforesaid, but doth absolutely disavow and refuse to further prosecute of and upon the said third count of his said declaration against the said Samuel."

General demurrer *inde*, on which it came before the court

[*404] *Emott*, for the defendant. *From the facts contained in the replication, it will be seen that the present question really is, how far the laws of Connecticut shall control the operation of those of our own state. The contract is set forth not only to have been made in Connecticut but to have been there made with a reference to the statutes there in force, and, therefore, that the seventeen years' limitation of the right to sue formed a part of the contract. There can be no hesitation in allowing that the *lex loci* shall regulate, when we are to decide on the validity of a contract. Our statute of limitations is, "All actions upon the case," &c. shall be commenced within six years after the cause of action accrues, excepting in those cases contained in the proviso; and, to be entitled to the benefit of this, the plaintiff must show that he comes within it. He should have gone further; in addition to the contract being made in Connecticut he ought to have shown that the defendant continued to reside there till within the last six years. By the English statutes, the absence of the plaintiff takes the case out of it; with us, it is only that of the defendant; (a) and, therefore, a suit may be brought here when it could not there. This greater strictness in denying the effect of the proviso to absent plaintiffs, will make this court less inclined than even the English to extend the saving of the statute. If therefore, the statute would be a bar in England, *a fortiori*, in the state of New York. In *Robinson v. Bland*, Black. 241, it is acknowledged that the statute of limitations may be pleaded to a foreign contract. The words of Blackstone, J. in that case, are,

(a) *Ruggles v. Keeler*, 3 Johns. Rep. 264. S. P. And though the defendant never has been within the state, the saving continues till he is.

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"The statute of limitations has been frequently allowed to operate on transactions abroad." And, in the same book, p. 257, Mr. *Wedderburne*, in his reply, admits this; but observes, that it runs only when both parties are in England. It does not affect the validity of the contract, but only the mode of recovering on it, that is, it goes only to the remedy and not to the right.

This case, therefore, is inapplicable to the *rules [*405] laid down respecting the *lex loci*. The general one, as given by Lord Mansfield, *ibid.* 258, is, that the law of the place where the action is brought, is to be considered in expounding and enforcing the contract. To the same effect is *Duplein v. De Roven*, 2 Vern. 540. In 2 Kaimes, 353, 3d edit. it is, on this subject, said, "Several questions arise from the different perscriptions established in different countries. In our decisions upon this head, the case is commonly stated as if the question were, whether a foreign prescription, or that of our own country, ought to be the criterion. This should never be made a question; for our own prescription must be the rule in every case that falls under it, and not the perscription of any other country." Admitting, therefore, fully the *lex loci* in expounding contracts, this is not a case of exposition, and does not, therefore, come within those authorities. *Lodge v. Phelps*, 2 Caines' Cas. in Err. 321. S. C. 1 Johns, Cas. 139, is a case in our favor. There the endorsee of a Connecticut note was allowed to proceed in his own name against the endorser. This goes to show that in all cases where the question turns on the form of action, the law of the country where the defendant is found, and not that where the contract was made, ought to prevail. Therefore, as it is not shown that Tupper was out of the state till within six years, the suit cannot be maintained.

Gold, contra. By the pleadings in the case, the truth which stand confessed by the demurrer, the court will find that the defendant entered into the contract with a refer

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nce to the laws of Connecticut alone. It must have been intended, then, that the rules of those laws should be exclusively resorted to, as the measure of justice between the parties. By the code, ordained as the law of Connecticut, obligations by specialty, and simple contract demands, are placed on the same footing. When, therefore, in that state, a note of hand is taken, the creditor takes, and the debtor gives, the same security as would be created *here* by a specialty, or sealed obligation. As they are thus equal in their nature, the statute of limitations couples them together, and one uniform rule applies to both. If, then, the [*406] creditor *regards the continuance in his debtor of the duty to pay on every specialty which is taken, both parties imagine, and agree, that there is, for seventeen years, a continual obligation to satisfy the demand whenever called on. When the debtor executed these notes, he consented to be bound for payment of their several amounts, and so to continue for seventeen years; during that period, it is a further part of his agreement, that no presumption of payment shall be made. It is on this presumption of payment that every statute of limitations is founded. Therefore, a promise to pay, as it rebuts the presumption, and shows the debt has not been paid, is allowed on all hands to take the case out of the statute.(a) No-

(a) By the old cases, a *promise to pay* was deemed necessary to take a debt beyond the period of limitation, out of the effect of the statute; a mere *acknowledgment of the debt* was not held sufficient, *Andrews v. Brown et Ux.*, Proc. in Cha. 386. *Deane v. Crane*, 6 Mod. 309. *Dickson v. Thompson*, 2 Show. 126. *Bland v. Heselrig*, 2 Vent. 152, being as was then said, only evidence of a promise. *Heyling v. Hastings*, 5 Mod. 426. This, however, is now overruled. From a review of the later decisions, the following rule may, perhaps, be laid down as their result. "Any words, though spoken after action brought, which show that the debt has not been fully and *bona fide* paid, is such an acknowledgment of its being due, as will rebut the presumptive bar arising from the statute of limitations." *Yea v. Fouraker*, Bull. N. P. 2 Burr. 1099, a note of the same case. *Trueman v. Fenton*, Cowp. 544. *Lloyd v. Maund*, 2 D. & E. 760. *Bailie v. Lord Inchiquin*, 1 Esp. Rep. 435. *Peters v. Brown*, 4 Esp. Rep. 46. *Lawrence v. Worrall*, Penke's Cas. 93. *Bryan v. Horseman*, 5 Esp. Rep. 81. S. O. 4 East, 590

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thing, then, can be more fairly inferred, than that the debtor has consented that these securities should create an obligation for seventeen years, and that, during such time, the

Stubbs v. Champlin, 4 Johns. Rep. 461, though in an affidavit for leave to plead the statute to the action. *Rucker v. Hannay*, 4 East. 604. The promise to pay is a conclusion of law, for which the debt so acknowledged to be unpaid is a sufficient consideration. On this ground it has been ruled, that although the debtor, in the same breath in which he has confessed the debt to be due, add that he is discharged by the statute, *Clarke v. Bradshaw & Coglan*, 3 Esp. Rep. 155, or state a part to be paid, *Bryan v. Horseman*, *ubi sup.*, the statute does not apply; because, against conclusions of the law, there can be no opposition. But as the promise of payment is a mere conclusion by implication of law, though it cannot be contradicted, it may be qualified in any manner not inconsistent with the legal inference. Therefore, notwithstanding such payment would, by intendment of law, be due immediately and absolutely, as, *expressum facit cessare tacitum*, the debtor may annex a condition to his promise, and charge the plaintiff with it, *Heyling v. Hastings*, 1 Salk. 29, or bind himself only when able. *Davies v. Smith*, 4 Esp. Rep. 36. *Cole v. Saxby*, 3 Esp. Rep. 159. It seems, that any mode of payment different from that appointed by the law, as in goods, would be conditional; *Bush v. Barnard*, 8 Johns. Rep. 407, in which case the *onus* of proving the condition performed, and of tendering himself ready to receive, where the payment is otherwise than in money, lies on the plaintiff; though it is enough for him, as to ability to pay, to show it from the defendant's ostensible circumstances, and appearance in the world. When the debt is denied, as by saying, "I have no recollection of the debt, and rely on the statute," *Bryan v. Horseman*, *supra*, or "I have paid the bill and taken a receipt, and will send a copy," though none be sent, *Birk v. Guy*, 4 Esp. Rep. 184, the statute is a bar. So, where the defendant refers his creditor to another for his determination and ability. *Bicknell v. Keppel*, 1 N. R. 20. The acknowledgment, to take a case out of the statute, need not be by the party himself; if by an agent, or servant, usually employed in the transaction of the defendant's affairs, it is sufficient. *Palethorp v. Furnish*, 2 Esp. Rep. 511, (n). Where the interest is joint, the act of one is the act of all; therefore, an acknowledgment by one of several makers of a joint and several promissory note, is obligatory on all. *Whitcomb v. Whiting*, Doug. 652. So, after the dissolution of a partnership, an acknowledgment by a partner of an account made out by him, will set up the debt against the operation of the statute. *Smith v. Ludlow*, 6 Johns. Rep. 267. Any act admitting the debt, is equivalent to an acknowledgment. A credit given, or item charged, by a defendant, within six years, will, where there are mutual accounts between him and the plaintiff, take the whole of the demand against himself out of the statute. *Callins v. Shoulding*, 6 D. & E. 189. *Cogswell v. Dolliver*, 2 Mass. Rep. 217. So a partnership account made out by a partner, after a

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138, in which the court determined that a man cannot be held to bail in England, upon a contract to pay money, made in France, if, by the laws of that country, his person is not there liable to be restrained for the debt. And in order to prove that such was the case then in dispute, Pothier on Obligations, and an affidavit of a counsellor of Paris, were received as evidence. Here the remedy alone was the point in question; as the laws of the community where the debt arose gave no lien on the body, it was disallowed in a case where, by the English code, the defendant was immediately liable in his person, and might be held to special bail. The English bench, against the course of their own court, and against the laws of their own land, adopted those of France, in determining the extent [*408] *to which a debtor had pledged himself by his engagement. Chief Justice Eyre, in giving his opinion, fully adopts the doctrine of the *lex loci*, and observes, whatever would constitute a defence to the action in France, would in Westminster-Hall. The reverse of this must be equally true; what is no defence in Paris, will be none in London. This however, is now denied, and while the *lex loci contractus* is admitted to create the contract, yet it is attempted to interpose the *lex fori* to protect the debtor, under the idea of the laws of the jurisdiction affecting the remedy but not the contract. It is, with due submission, imagined, that the defence set up by the opposite party attached on the contract, and made a part of it. It is of the utmost importance, that a creditor should know how long he may repose on his security, without its being presumed that it has been paid. In this state, by taking a bond, he would have intended to protect himself against this presumption

on a contract made in his own country, by the laws of which his person was privileged from arrest. But where the laws of a foreign country had suspended all right of proceeding on certain contracts, antecedently made, it was held by the circuit court for Pennsylvania district, that a suit could not be maintained upon it during such suspension, and the defendant, therefore, discharged on common bail. *Conframp v. Buel*, 4 Dall. 419.

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for twenty years. To create an equal bar to presumption, such as an obligation would have inferred, must have been in the contemplation of the parties in Connecticut; because the law gives the security taken the same advantages. If the maker and payee had, in Connecticut, been asked to expound their own contract, they would have said, it is to last and continue, firm and good, against all presumption, for seventeen years. This, then, attaches itself to, and is an integral part of, the original contract, and, therefore, repels the bar growing out of a foreign jurisdiction, our statute of limitations pleaded in bar. If the act did not operate on the contract, but merely suspended the remedy, it would be matter of abatement, not bar; because bar goes to the right, not to the remedy; and the statute presumes payment made: therefore, the judgment is in chief, and exhaust the debt, which becomes, as it were, dead. If the defendant meant to avail himself of our limitation act, he should have stated that the notes were made with a reference to our laws, or at least, should have gone on to set forth his own residence for six years last past. The court will refer to the pleadings, and see that they show the *lex loci contractus* to have attached on the contract; and if the *residence of the defendant would af- [*409] fect the question, that circumstance should have been specially set forth to exonerate him from the operation of the laws of Connecticut. In the case of Phelps, the court guarded against the conclusion that might be drawn against *lex loci contractus*; and the courts of Connecticut have allowed the endorsee of a New York note to prosecute in his own name, giving thereby a remedy according to the *lex loci*, which would have been devised by the *lex fori*. Let us, for one moment, advert to the consequences of refusing to adopt the principles for which we contend. The laws of many states place simple contract debts on very different footings: one fifth of the money lent out may be advanced on securities like those on which the present action is grounded. These, after six years, are here

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presumed to be paid; suppose the maker of a note removed to Connecticut, it will be in vain that he will say, by the laws of New York the debt is barred; the creditor will proceed and recover, when, in the country where the whole transaction took place, he could never get a shilling. If this rule is to prevail, a creditor has only to watch his passing debtor, arrest him *in transitu*, and attain payment long after every hope was, by law, and the implied basis of the contract, totally gone. The court, therefore, will be cautious in making a decision, which, by rejecting the laws of a foreign state, in expounding the terms of a contract made there, becomes a necessary precedent to that state, in regulating the justice it is to measure out to the people of New York, which will, out of the limits of New York, create a seventeen, instead of a six years' limitation. One contract may, by this means, have a dozen different interpretations: a debt is contracted in New Hampshire; the debtor comes here, and a six years' quiescence discharges him; he goes to Connecticut, and the debt revives; according as the limitation is long or short, he by his own act, settles the period of his creditor's demand. It is impossible to deny him this power, if the intention of the parties to the contract, and their resulting duties, arising from a reference to the laws of the country where that contract was made, are to be departed from: for, instead of placing the agreement [*410] *on those resulting duties, and the basis contemplated by the parties, it leaves *that*, and the duties to which they bind themselves, to the sport and control of the most contingent and capricious events; to the debtor's locomotive will; to the laws of any and every state or kingdom in which he may from time to time erect, from among all the nations of the earth, to take up his residence. Instead of one plain and uniform rule of construction, what an endless and perplexed confusion is suggested? A suggestion which fixes nothing, but unsettles every thing; which renders every judgment insecure, and all suits every thing but final. Such must be the consequence, though it

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may be attempted to show the contrary by refined distinctions between the remedy and the contract.

There is another point of view in which this case may be presented. Among the nations of Europe, a principle of comity has introduced a respect for each other's laws and constitutions. Between the individual states which compose the union it is submitted, whether there is not a far more cogent reason to respect; even as a bond to preserve the federal government. There is a part of the constitution by which it is created, that ordains, "No state shall pass any law impairing the obligation of contracts." Does not this impose on the court an additional obligation to respect the laws of a sister state, in the exposition of a contract made *there*, more than what arises from the mere comity of nations? If the court will apply a principle drawn from the laws of their own state, contrary to those of Connecticut, and not contemplated by the parties to the contract when it was made, do they not impair the force of obligations? Besides, under this construction, full faith cannot be given to the judicial claims of the citizens of different states. This is mentioned merely as a feature in the constitution, to show with how much circumspection the court ought to proceed. Suppose the case had arisen in a court of the United States, that a Connecticut creditor, on a contract made there, had sued a New York debtor, can it be supposed that there would have been the hesitation of a moment in adopting the *lex loci contractus*, the laws of Connecticut? It is submitted whether an act of this state, which should abridge the period given by a foreign contract to a creditor, within which he should not be obliged to demand his debt; which should deny him the right to have recourse to his contract for any part of the time which was allowed by the laws of the state where it was made, it is submitted, I say, whether such an act would not, under the constitution, in the extensive sense of the terms, impair the obligation of the contract.

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Emott, in reply. An objection has been raised against the force of our plea of the statute of limitations, from a clause, or part of a clause in the constitution of the general government; that no act shall be passed to impair the obligations of contracts. From the use made of this passage, it will follow that all statutes of limitation must invariably remain as they now are, and that no state can ever lengthen or shorten the period; because that would be to impair the rights of others, in existing obligations. The meaning of the words are, that no state shall pass laws tending to impair the validity of contracts made in other states. The argument on the part of the plaintiff seems to suppose, that if the statute be allowed, the debt cannot be recovered. Not so; the contract remains as it was; all that is said by us is, that when attempted to be enforced against our laws, they interpose; but if it be carried back to Connecticut, then our statute, or a judgment under it, is of no avail. The security was taken, subject to any variations the state in which it was given might make; and also to such as any other might adopt, where it should be put in suit. After the defendant has resided six years in this state, the statute attaches wherever the contract was made. For the words of the act are direct and positive. "No action shall be commenced," &c. without reference to the citizens of this or any other state. Under the letter and spirit of the act, the suit ought to be brought within six years, or the plaintiff should show himself within the proviso. If the legislature choose to pass a law, the court cannot say they have no right to do so; and it is to be observed, that this [*412] statute is only a continuance of a *former act.

Allowing the defence, does not deny the contract; on the contrary it admits but avoids. We say, you have brought your suit here, and all that you can claim is the benefit of those laws to which you choose to resort.

LEWIS, Ch. J., delivered the opinion of the court. This

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is an action of assumpsit on two promissory notes made by the defendant to the plaintiff.

The question arising on the pleadings is, shall the *lex loci contractus* govern, or shall it not?

It is a well settled rule, that contracts, with a few exceptions, are to be construed according to the laws of that country, in reference to which they are made. But it is equally well settled, that the remedy on them must be prosecuted according to the laws of that country in which the remedy is sought. In the case of *Duplein v De Roven*, the cause of action arose in France; it was on a judgment obtained in that country. The defendant pleaded the statute of limitations, and held a good bar to the action.

In *Lodge v. Phelps*, decided in October term, 1799, it was held that though promissory notes, made in Connecticut, were not there negotiable, they might be negotiated here, and a suit maintained on them in the name of the endorsee. For that the principle of the *lex loci* shall not affect the form of action, but shall have reference only to the nature and construction of the contract, and its legal effect; not to the mode of enforcing it.

In a much earlier case, viz. that of *Page and Cable*, decided in this court, in April term, 1795, the precise question now before us came under consideration. It was an action of *assumpsit*, on a promissory note made in Connecticut, by George Cable, to Jonathan Cable the defendant, and by him endorsed to David Page, the plaintiff.

*The whole transaction took place in Connecticut. [*413] The plaintiff declared, first, under our statute, as endorsee; secondly, on the endorsement as a special agreement; setting forth the contract as originating in Connecticut, and the defendant as guarantying the payment by George Cable, and on his default engaging to pay for him.

The defendant pleaded the statute of limitations of this state, and the plaintiff demurred, alleging for cause, that no such statute existed in Connecticut, where the cause of action arose.

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The court said, that the defendant having elected to prosecute his suit in this state, he must pursue his remedy agreeable to our laws, and that our courts could not dispense with an adherence to the requisites of time, place, and manner of commencing and prosecuting a suit, because the cause of action arose in another state. They conceived, that such adherence by no means impaired the obligation of the contract, and they gave judgment for the defendant. The correctness of those decisions I feel no disposition to controvert, but conceiving the law on the point as settled, we are of opinion judgment must be for the defendant, and with this opinion the Scotch and Dutch laws accord, as will appear from Erskine's Institutes, vol. 2, 581, 582; Kaime's Equity, vol. 2, 358; Haberi Prælectiones, vol. 2, book 1, tit. 3; De Conflictu Legum, sec 7.[1]

LIVINGSTON, J. No other question occurs on this case than whether we are bound to enforce the limitation enacted by a statute of our own state, or allow the plaintiff the same time as he would have had before a tribunal in Connecticut?

[*414] *In the exposition of foreign contracts, courts take notice of the laws of the state in which they are made, or manifest injustice would ensue. This is a dictate of common sense, and is become a principle of general law. In suits on contracts made abroad, the parties in their pleadings must observe the forms of the country where the action is depending; but in deciding on the merits, the *lex loci* will be the rule. This distinction is found in the Roman and French law, and Emerigon speaks of it as adopted by all elementary writers.

"Pour tout ce qui concerne l'ordre judiciaire, (or form of action,)" says that author, "on doit suivre l'usage du lieu ou l'on plaide, mais pour ce qui est de la décision du

[1] See *Benjamin v. De Groot*, 1 Denio, 157; *Randall v. Wilkins*, 4 Denio, 577; *Fowler v. Hunt*, 10 J. R. 464; *Lincoln v. Battelle*, 6 Wend. 475; *Ruggles v. Keeler*, 3 J. R. 263.

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fin, (or the merits,) on doit suivre, en regle generale, les loix du lieu ou le contrat a ete passe *ex consuetudine ejus regionis in qua negotium gestum.*"

Another author on the same subject, holds nearly the same language. *In his quæ respiciunt litis decisionem, servanda est consuetudo loci contractus. At in his quæ respiciunt litis ordinationem, attenditur consuetudo loci ubi causa agitur.*

Emerigon also mentions an instance of a suit between two Englishmen in France in which the plaintiff insisted on proving by witnesses a parol contract for a loan exceeding one hundred livres. The defendant pleaded an ordinance resembling in some respects our "Act for the prevention of frauds," which required contracts of that amount to be in writing, and no other proof was to be received of it but the instrument itself. The parliament of Paris, however determined, that this being a valid contract in England, when it was made, the ordinance did not apply, and the plaintiff recovered. "Il fut juge, (says the author who reports this decision,) par le parlement de Paris, que l'ordonnance n'avoit point lieu, d'autant qu' elle va *ad litis decisionem*," or to the gist of the action. *Traite des Assurances*, c. 4, s. 8.

On a point of general law, where we have no rule to the contrary, I cannot well err in conforming to one which we find adopted by a foreign tribunal, heretofore among the most distinguished in Europe, for the [*415] purity and wisdom of its decisions; a necessary consequence of the great learning, integrity, and independence of its judges. But the same rule, I conceive, prevails here. A note bearing a yearly interest of more than 7 per cent. if made abroad and lawful there, may be recovered here, notwithstanding our statute against usury. I see no reason why the same respect should not be paid to the limitation acts of another state. Our statute against usury is quite as imperative in avoiding the security, as that which prescribes the time after which a suit shall not be brought; yet courts have invented, or sanctioned, several

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exceptions, not within its provisions, to prevent a failure of justice. Thus, an acknowledgment of the debt has defeated its operation, or arrested its course. Why, then, not regard an exception created by the parties themselves, which must be presumed to be the case whenever they contract, with a view to a different limitation? No violence is done to our law, by permitting them to establish for themselves, a rule different from that which would take place in case of their silence. If the defendant had agreed in writing not to avail himself of the statute of limitations of this state, if the suit were commenced in seventeen years, a doubt can hardly be entertained of our giving effect to such an agreement. I perceive but little if any difference between a written contract of this kind, and a case in which the defendant must be presumed to have had in his eye, the laws of his own state, and, therefore, have virtually agreed to pay these notes, if sued within that period. To leave his state, therefore, prior to that time, and then set up a defence in violation of his own engagement, and the understanding of the plaintiff, is an injustice which ought not to be suffered, if, without a breach of duty, we can prevent it. It may be said that if a party becomes a suitor with us, he must be bound by our laws. This is true, as it respects the form of action, or mode of obtaining the remedy. Courts will, and ought to adhere to their own forms, but in deciding on the merits of the demand, or defence, they do not derogate from their dignity. [*416] by enforcing the laws of the state where the contract originated. The present defence is a perpetual bar to the action, and, therefore, involves in it the merits, and not a mere question of form.(a) If so, the laws

(a) With deference to the bench by whom the decision in this case was pronounced, there does seem great force in the reasoning of the learned judge who dissented from them. If the exposition of a personal contract is to be governed by the law of the country where made, unless entered into with a view to that of another state; if, as we have determined, in *Thompson v. Ketcham*, 8 Johns. Rep. 189, the time of payment is, by judgment of law,

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of Connecticut should be our guide, and not those of our own state. *In foro conscientiae*, the plaintiff's case is a clear one. The defendant, by his demurrer, admits, that if he had not come to this state, the plaintiff might and ought to have recovered. It would be matter of regret, if we were compelled to listen to as unjust a defence, considering the real understanding of those parties, as was ever obtruded upon a court of justice. It would not be easy to assign a reason why an obligation incurred in one state should be cancelled by either of the parties flying to another. We are not, in my opinion, under the necessity of establishing a principle or practice which may so easily be abused, and must always be followed by great injustice. So long as we are at liberty to expound contracts *lege loci*, it is our duty to discountenance a defence, which in such country would not be allowed. When the defendant left Connecticut, the plaintiff had a good cause of action against him, which ought not to be defeated by his own act, in coming among us. I think, therefore, that as this defence has nothing to do

a part of the original contract, why is not the *time of prescription*, as declared by the law, equally a part of the original contract? If it be so, is it not of the essence of the contract, according to the exposition which the law would give in Connecticut, that a prescription of less than 14 years shall not be set up against a promissory note? When we make six years a bar, is it not to expound the contract according to our law, and not according to that of the country where the instrument was made? To a foreign bond we cannot plead our statute of usury; because we do not admit of a defence on the *merits*, which the law of the country where the deed was executed would not allow. The *lex fori* knows not of any bar to the *right*, which does not exist by the *lex loci contractus*. On this very principle we have disallowed, in the case cited above, a plea of infancy to a note, because not shown to be a good defence where the note was made. Where is the difference between a bar from infancy, a bar under the statute of usury, and a bar under the statute of limitations? Do they not all go to the action, and not to the form of the action? The doctrine of the *lex fori* would apply, if on promissory notes the action of covenant were used in Connecticut, and the same form were attempted in a suit in our courts. A late decision has, however, fully adopted the law of the case in the text. It has been ruled that the statute of limitations is a good plea in bar to an action on a judgment in another state. *Hubbell v. Cowdry*, 5 Johns. Rep. 132. See also *Ruggles v. Keeler*, 8 Johns. Rep. 263.

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with the form of action but strikes at the plaintiff's right to recover at all, we should apply to this case the limitation act of Connecticut, and that as seventeen years have not run since these notes were made, the plaintiff should have judgment.

Judgment for the defendant.

THE PEOPLE OF THE STATE OF NEW YORK *against* BROWN
and others.

Intrusion for a forfeiture of lands granted in fee, will not lie before office found. Intrusion must be on the actual possession of the people. The people can acquire seisin or possession of lands, for breach of condition by matter of record only.

THIS was an information filed, at the direction of the legislature, by the late attorney-general, against the defendants, for an intrusion on certain lands lying in the county of Otsego.

The defendants claimed under letters patent, of the 6th of September, 1770, for 9,200 acres, granted by his majesty, George the Third, of Great Britain, France and Ireland, king, &c. at a quitrent of two shillings and sixpence, sterling, for every hundred acres. After the usual [*417] reservations *of mines and white pine trees, for masts, the grant contained the following proviso: "Provided further, and upon condition also, nevertheless, and we do hereby for us, our heirs and successors, *direct and appoint*, that this our present grant shall be registered, and entered on record, within six months from the date hereof, in our secretary's office, in our city of New York, in our said province, in one of the books of patents there remaining; and that a docket thereof shall be also entered in our auditor's office, there, for our said province, and that in default thereof, this our present grant shall be void and

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of none effect, any thing before in these presents contained to the contrary thereof, in any wise, notwithstanding."

It was admitted that no docket of the said letters patent had been entered in the office of the auditor, pursuant to the said proviso; but the following entry, made since the year 1797, was found in a memorandum book of patents in the office of the comptroller of this state, to wit: "1558, patent granted to Leonard Lispenard(a) and others, for 9,200 acres of land in Albany county, dated the 8th of September, 1770, at two shillings and sixpence, sterling, for every hundred acres."

About the same time when the above memorandum was made, Samuel Jones, Esq. comptroller of this state, pursuant to the laws relative to quitrents, caused the aforesaid tract of land to be advertised for payment of the quitrents due.(b)

It was further admitted, that on the 3d of April, 1799, the sum of 3 dollars and 84 cents was paid into the treasury of this state, by George Stanton, one of the original patentees, in pursuance of the act for the collection of quitrents, as the arrears and commutation then due on lots No. 41, and 42, and, that, on the 28th of October following, 3 dollars and 82 cents were in like manner paid, on 50 acres of the grant, by one Jesse Clark, who had purchased under the patent, from which the defendant Brown derived his title; but neither the lots 41, and 42, nor the 50 acres on which the said 3 dollars and 82 cents were paid, constituted any part of the lands in his tenure.

*On these facts, the question was, whether the [*418] defendants were or were not guilty of the intrusion complained of.

Spencer, (Attorney-General.) It is admitted that there was no docket entered in the auditor's office, according to

(a) The name of the first patentee.

(b) Under the 8th section of the "Act concerning quit-rents," passed 8th of April, 1801.

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the proviso in the letters patent. The information is grounded on this principle, that the forms required by the grant created a condition, proviso, or limitation, which was to make it void on the not doing a certain act by the patentees. If therefore, this act has not been performed, the instrument is a nullity, and the people have a right to consider all persons now on the land as intruders. It may, perhaps, be urged in behalf of the defendant, that the act concerning quitrents has done away the forfeiture; especially as the officers of government have received the quitrents due, and, therefore, considered the patent as in existence, and good. That, however, will depend on whether the not docketing the patent within the time limited, did not cause the estate of the patentees to instantly cease; or whether, even allowing the contrary, the payment could purge the forfeiture for more than those very lands for which made, and which do not include those for which the intrusion is brought. There can be no doubt that every grantor, whether a state or an individual, may annex to his grant whatever conditions he pleases, provided they are not repugnant to principles of law. Here, the condition is, that the grant shall "*be void and of none effect*." Therefore, the acceptance of rent could not restore what was gone. *Sir Moyle Finch's Case*, Cro. Eliz. 321, shows the soundness of this position. This, it may be said, was the case of a demise for years. A distinction, therefore, may be attempted between *that* and the present, which is of a fee. In fact, however, the diversity does not exist. This the court will see in 17 Vin. 81, pl. 1. n.(a) It is not, that in one case the estate is void, and in the other voidable; but whether the determination

(a) The decision alluded to is *Stephens v. Potter*, Cro. Car. 100, 2d Rea., but that merely determined that a lease for years, reserving rent payable at the exchequer, is void on non-payment, without office found; whereas, if the rent be payable to the receiver-general, non-payment, without office found, does not vacate. The reason is obvious, as the crown can grant only by record, it can be informed only by record; the non-payment to the receiver is a matter *in pais*; when found by office, it is of record, and so is non-payment at the exchequer. See, however, this doubted, 2 Roll. Abr. 216, (B

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be by the same means as create the interest. The proviso here was a limitation which ended the estate on non-performance; because, as it was created by matter of record, so it was to be destroyed *by matter of re- [*419] cord. It is generally true, that where a freehold is to be defeated, entry is necessary; but it is not so where an act that ought to appear of record is not done. It is laid down that if an estate granted by the crown determine by a condition broken, the king shall be seised without office found, where the breach is apparent upon record. 7 Com. Dig. 53. (D. 70.) (a) It is the revesting the estate which we contend for here. This makes the difference between the present question and that of Van Schaick, in 1796, in which it was decided, by the court of errors, that a new grant could not be made till after office found; not that an information would not lie before. There can be no doubt of the words used in the grant creating a condition, operating as a limitation or qualification of the estate. Litt. sec. 329. For this purpose, the word "provided" was certainly the most fit. On breach of it, the estate must be judged in the grantor, or, as here, the people. Litt. sec. 350. (b.) So here, as the non-performance was of record, the right to proceed by intrusion accrued before office found, the estate of the patentee being totally divested.

The next consideration is, whether any thing has been done to waive the forfeiture. This may be laid down as an established position; what is void cannot be confirmed, what is voidable may. As, then, the interest of the patentees was absolutely annulled, the receipt of the quitrents could not revive it. *Jenkins v. Church*, Cowp. 482; *Doe v. Butcher*, Doug. 50. Even in avoidable cases, the mere acceptance of rent, unaccompanied with any other circum-

(a) The cases there referred to are of leases.

(b) The case of a lease for five years, with condition to have fee on paying of forty marks at the end of two years, and livery of seisin according to the deed. Revested by implication, because grantor could not enter upon the breach, as, by his own grant, the grantee had three years in the land.

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stances, will not work a confirmation. See *Green's Case*, Cr. Eliz. 3; *Roe v. Harrison*, 2 D. & E. 425. No receipt can revive or confirm, unless taken with a knowledge of the forfeiture, and an intent to waive it. The act concerning quitrents does not recognize any loss of title in the defendant, or others holding under the same patent. No payment, therefore, to an officer acting by authority of a general law, with a power merely to extinguish quitrents, could revest. All that he could do was to bar the right of the people on them when due, and not by taking them, if not due, to give away the land of the state.

[*420] **Emott and Van Vechten*, contra. Though from the length of time the defendant, and those under whom he claims have been in possession, the case is a hard one, still we are ready to exculpate both the present and late attorney general from all imputation of rigour. They have acted only in obedience to resolutions of the legislature. The case divides itself into two questions; 1st. Whether the grant be void, or voidable? 2d. Whether, if so, the present form of proceeding is the appropriate remedy? Whether void or voidable, will depend on a number of subordinate inquiries. We did not, it must be confessed, expect that the proviso would be urged as a limitation, which always goes on a certain express time of determination; it is a condition,^(a) and nothing more; in which case, as the estate might continue over, it was voidable, and not void. But the words in question created neither the one nor the other; they were merely directory on the officers of government, and did not oblige us to do any thing: they are separated from the conditions by which the grantees were bound by specific acts. The words are, "we direct and appoint. The clause itself is rare, this being the only grant we can find in which it is contained. The officers of government ought, the clause being directory, to have given notice to the patentees to come in and docket;

(a) As to conditional limitations, see *Fearn's Con. Rem.* 2, 6th ed.

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for, to the patentees themselves, the act was nugatory, as they had complete evidence of the right by the grant itself. But, considering the clause as a condition, then, we contend, it is repugnant to the grant, and void. It was for an act to be done by the officers of the crown, (a) for the benefit of the crown alone. It is the same as if the grantor had conveyed, on condition that he should himself lodge the consideration-money, within 20 days, in the United States bank, or the conveyance be void. The result would be, to put the whole grant in the power of the crown; or, what is the same thing, within that of its officers. But, should the condition in the proviso be deemed a valid one, and obligatory on us, we say it has been performed; for if the intent be complied with, it is sufficient. That the leaning of the court is *against forfeitures, we cite [*421] Bull. N. P. 96, and that the intent, and not the letter of the words ought to regulate. Shep. Touch. 139. (b) 1 Atk. 375. (c) *Daley v. Desbriere*, 2 Atk, 261, and the cases cited in n. 1, p. 264. What, then, was the intent to be answered by this docket? Merely to inform the court of the existence of the grant, and the value of the reserved rent, that no interfering patents might issue, and the amount of its revenue be known. The entry, therefore, in the comptroller's office, taken from the old minutes there, was fully adequate to every purpose. For though two acts are mentioned in the proviso to be done, it does not follow that both are necessary to be performed. *Long v. Dennis*. (d)

(a) Where a benefit is to accrue to a third person, on the performing an act by another, that circumstance will not excuse the act; if not performed, perhaps an action would lie. See *Ex parte Carruther*, 9 East, 47.

(b) That is, if the act done be in law tantamount to the condition expressed, as if to enfeof; and a lease and release be executed. So in the case put Litt. sec. 352, on the doctrine of *cy pres*.

(c) *Harvey v. Aston*. The condition there was marrying with consent. The other authority from *Afkyns*, relates also to conditions in restraint of marriage.

(d) That also was a decision on a case in restraint of marriage, in which the conditions were held to be in the disjunctive, performance, therefore, of one is sufficient.

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4 Burr. 2052. In the present case, however, after a lapse of 30 years, in a country circumstanced as this was during a revolutionary war, and when the very record may be supposed to have been taken away by the officers of the crown, to presume a docket regularly entered is no more than what the law will warrant. *Bedle's Case*, 12 Rep. 5.

Should it, nevertheless, be held, that the forfeiture was incurred, we still contend that it has been waived. The argument urged against this position, that there is a distinction between the acts of individuals and those of officers of government, is contrary to the implication arising from the case of Sir Moyle Finch, relied on by Mr. Attorney. For the people are bound by the act of their agent, in the same manner as any common person. What then, are those acts? First, the permitting 30 years to elapse in silence; next, the comptroller has made a record, or docket, by entering the memorandum stated in the case to have been written in 1797, which fully sets forth the dates, parties, and rents; this, too, is an act of a public officer. Secondly, by advertising these very lands for the quitrents due, under the authority of the act mentioned in the case; for the language of the advertisement is, we claim not the lands, but the quitrent due. Thirdly, the comptroller has received from one of the patentees, and from a person holding under the grant to them, quiterents for some of these lands, and though they have been paid but upon portions of the tract, yet they will accrue to the benefit of

[*422] the whole grant. *Goodright v. *Davids*, Cowp. 803.(a) *Pennant's Case*, 3 Rep. 64, b.(b) *Green's case*, Cro. Eliz. 3.(c) 3 Salk. 3.(d)

(a) The point there was, that acceptance of rent, after condition broken, with notice of the breach, is a waiver of the forfeiture.

(b) Which of the resolutions there made is alluded to, I know not; possibly the third, but that goes on the distinction between void and voidable lease.

(c) Determined that receipt of rent due, does not prevent re-entry, but if accompanied with a receipt calling the lessee his farmer, or tenant, it does.

(d) That was an acceptance of rent from the executor of an assignee of a lessee, knowing him to be the executor; held a waiver of the forfeiture for assigning.

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Independent, however, of what has been before advanced we contend, that an information for an intrusion cannot be supported before office found. This is absolutely necessary to entitle the people to proceed. In the case of common persons, if it be intended to destroy an estate for a condition broken, it is indispensable that an entry should first be made. Shep. Touch. 153. Whenever an entry is required of an individual, an office must be found for the king. *Sir George Reynel's Case*, 9 Rep. 96, b. 16 Vin. Abr. 84, pl. 24. Ibid. 83, pl. 19, 20. Even where the whole estate has become void, by the non-performance of the condition, still an office must be found before the tenant can be held an intruder. *Sir Moyle Finch's Case*, 2 Leon. 143. *Payne's Case*, ibid. 206. The proviso on which the Attorney-General relies, being a condition, and the estate under the patent taking effect immediately, it is plain that the grant was voidable only, and not absolutely void. This being so, and nothing done to avoid the grant, and put the people into possession, intrusion, cannot lie, for it is essential to intrusion that it be on the actual possession of the crown. 8 Bl. Com. 261; Moor, 375.(a) Therefore, in all cases of forfeiture, &c. intrusion will not lie till office found, this being the legal substitute for entry by a private person, and the only means for the crown to regain the possession, for the injury to which the intrusion is brought. Moor, 296, 297. That this is only to be done by office found, *Parslow v. Corn*, Cro. Eliz. 855, is an authority fully in point. Besides, the title created by the patent was matter of record, and, of course, must be avoided by that which is of equal solemnity. Plowd. 229, and the cases there cited. The only method, then, to have been pursued, was by an office finding the forfeiture, and intrusion upon that. This will appear still more evident, if we consider the effect of the different proceedings. On the inquest of office,

(a) The words in Moor are, "An information for intrusion is not a real, but personal remedy, and resembles, in all points, a trespass against a subject, for it supposes the queen in possession."

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performance of the condition, or refusal by the officer, which is tantamount, 10 Rep. 67, b. 2d Res. might have been shown, but this could not be done under an information for intrusion, which merely states the possession of the crown, and the defendant's intrusive entry

[*423] *Case of Alton Woods*, *1 Rep. 28. Plowd. 479.

The necessity, therefore, of these measures must appear, that the parties might have notice of the grounds of the claim against them. This cannot be done by the information now brought, which is not like a writ of escheat that sets forth the whole claim on the part of the crown. If what has been laid down already for us be true, that the docketing was a duty to be performed by the officer, then it is, for the honor of the crown, as the old books say, to be presumed that it has been done. *Case of the Churchwardens of St. Saviour Southwark*, 10 Rep. 66. For it can never be imagined that the crown would make a grant dependent for its validity on acts to be performed by itself, and omit those acts. Let it be observed, too, that no form of docketing is prescribed by the grant; and, as the revolutionary war has intervened, it may well be intended that the entry made in the comptroller's office, in 1797, was by way of docket, which could be no more than a memorandum for the guidance of the officers of the crown. If, however, the proviso be a voidable condition, then the doctrine of waiver will apply. For government can never be supposed to do so great a wrong as to permit men to make improvements, then offer to receive a commutation in discharge of quitrents due, on those very lands which they claim as forfeited, receive the amount, and then attempt to defeat their grant. Because, having dispensed with the condition in part, by a partial receipt of quitrents, the condition is dispensed with in the whole. *Dumper v. Sims*, Cro. Eliz 816. This species of construction is due to the liberality and honor which we are to suppose constantly actuate the proceedings of government, and is a principle universally acknowledged. *Bewley's Case*, 9 Rep. 131

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Molyn's Case, 6 Rep. 5; 10 Rep. 67. In a more peculiar manner is this to be adhered to after a lapse of 80 years, when the rights of third persons, *bona fide* purchasers, and others, are implicated. In *Van Schaick's Case*, it was settled, that where a forfeiture was apparent, by matter of record, then a *scire facias* should go; when it arose on matter *in pais*, an office must be found. The information, therefore, must fall.

Spencer, in reply. The words of the proviso are sufficient to show the docketing was not directory to the officers of *the crown. The grant was to be valid [*424] on doing several acts, some *in pais*, some, of record. If not performed in a certain time, the letters patent were to be *void*. The words "direct and appoint," are declaratory to the *patentees*, that the estate granted should be subject to the condition of *their* registering and docketing. This must always be at the request of the parties, who must do an act towards it: nay, they, according to the colonial system, had to pay for its being done, and, therefore, it was clearly a duty in them; for it is coupled with a stipulation, that if it be not performed, the letters patent shall be *void*. This makes the proviso a limitation; and when so, it is not necessary that an office should be found, because the crown would be immediately re seized. Poph. 53. Whether, however, it be considered as a limitation, or a condition, is immaterial for no office was necessary. It is required only to make the forfeiture known by matter of record. Here the docket was a matter of record; therefore, whether the grant was docketed, or not, would appear by inspection of the records. The forfeiture, then, being thus by matter of record, needed not to be found by office. The authorities cited by the other side are in conformity to this position. 2 Roll. Abr. 215; Cro. Car. 100; *Stevens v. Potter*. On the not docketing according to the terms of the proviso, the estate of the patentees was gone, and, this being by matter of record, the people were re seized. No act therefore, of

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their officer in taking rents not due, could revive an interest absolutely avoided and null. The cases from Cowper and Douglas, when looked into, will show this, though they are quoted as authorities against the people. The principle they settle is, that no acceptance will waive a forfeiture, without knowledge of all the circumstances by which that forfeiture was worked. The people had acquired a fee on breach of the condition. The quitrents, therefore, were merged, and a tortious taking by their officer of what was not due, not knowing it not to be due, can never waive their rights.

Van Vechten. We say, by the act he was constituted judge whether quitrents were due or not.

Spencer. We say he was not; that he was a mere receiver, delegated to receive alone. The act of the [*425] officer *in making the entry in 1797, was allowing his acts to enure to the advantage of the defendant, yet it was not in time. In arguing from the presumption the 30 years' lapse has afforded, the counsel seem to forget that there is a law^(a) by which the limitation of suits by the people for land, is settled at 40 years. It is an absurdity to settle a limitation at 40 years, and presume against it at 30. Nor can anything be presumed from the revolution, because the court know all the papers in the various offices were preserved. In one of the cases referred to, the presumption arose from this; that as the deeds were delivered in to be cancelled, (10 Rep. 67, 2d. Rea.) the officer should be presumed to have cancelled them; but were the deeds here delivered to be docketed? On every ground, therefore, we consider the people entitled; especially as the want of docketing is proved by the records, and an office found would be only surplusage.

^(a) Act for limitation of criminal prosecutions, and of actions at law. 1 Rev. Laws, 562.

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LEWIS, Ch. J. delivered the opinion of the court.

*To decide the question in this case it is necessary [*426] to inquire whether an information of intrusion lies under the circumstances detailed. To sustain a prosecution of this description it is necessary that the crown formerly, and the government now, should be in the actual seisin or possession of the subject intruded on. I shall lay down a few general principles or maxims, which I conceive incontrovertible, and which may be gathered from the two principal cases, relied on, that of Sir Moyle Finch, and of Sir George Reynel, as well as from the decision of the court for the correction of errors, in the case of *The Devises of Van Schaick v. King*, Cro. Eliz. 220; 2 Lev. 134; 9 Rep. 95, a.

1st. That the state can acquire seisin or possession of lands, for breach of condition, by matter of record only.

2d. That generally, where entry is necessary in the case of a common person, an office is necessary to entitle the state.

3d. Where entry and action are necessary to a common person an office and *sci. fa.* are necessary to the state. 9 Rep. 95, b.

It is true, there are cases where the crown may be in possession by seizure without office, but they are not cases of this description; they are confined to the forfeitures of the temporality of alien ecclesiastics, where the certainty of the matter appears in the exchequer.

There is an important and striking distinction between the case of Sir Moyle Finch and the one now before us. The forfeiture there was of a term; here, if any, of fee; now a fee shall never be void absolutely, for condition broken; but voidable by entry only, though it is otherwise of a term. But even in *Finch's Case*, as reported by Leonard, who states it much more at large than Coke, both Popham and Coke, who argued for the plaintiff, and *Manwood*, Ch. B. in giving judgment for the plaintiff, admitted that, although the lease was void without office, it was void in

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interest and property only, but not in possession. And that though the *queen* without office, and a common person without entry, might grant it over, yet the former could not without office prosecute for an intrusion, nor the latter without entry for a trespass.

These opinions, we think, decide the question; and that judgment must be accordingly for the defendants.

Judgment for the defendants.

[*427] *A TEN EYCK and C. ELMENDORF *against* G and B. TIBBITS.

On an assignment of a bond payable by instalments, with a covenant from the assignor, that "if the obligor should become insolvent, or not be able to pay, &c., and if the assignee, &c., should use all due diligence and take all legal measures, &c., immediately after the several sums of money shall respectively become due," the assignor is liable for the whole amount, on the insolvency of the obligor, on the first instalment becoming due, and the assignee is not obliged to wait till the last is payable. If the first instalment be not demanded, it will, unless the contrary be shown by the defendant, be presumed to have been paid.

An assignment of property under the absconding debtors' act, is evidence of insolvency in the debtor; and the assignee of his bond is not precluded from his action against the assignor, because he has not proved the amount under the debtor's estate.

THIS was an action of covenant, and came before the court on demurrer.

The declaration stated a bond, from one Jonathan Rennington to the defendants, in the penal sum of eight thousand dollars, conditioned for the payment of four thousand dollars, by instalments of one thousand dollars each, with interest, on the first days of May, 1798, 1799, 1800, and 1801; an assignment of this bond for "value received," by an endorsement under the hands and seals of the defendants, covenanting with the plaintiffs, "That in case the said Jonathan, the obligor in the said bond, should become

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insolvent, or not be able to pay and satisfy the said bond, and if the said Abraham and Conradt, their heirs, executors and administrators should use all due diligence, and take all legal measures by prosecution at law to recover the same, *and that immediately after the said several sums of money should respectively become due*, and should not be able by such means to compel the payment thereof, then and in that case, the said George and Benjamin did covenant to pay to the said Abraham and Conradt, the amount of the said bond, with interest, or such part thereof as should then remain due from the said Jonathan Rennington." The plaintiff then averred the second instalment of 1,000 dollars, due on the first of May, 1799, to have become payable, before which time, to wit, on the 25th of December, 1798, the said Jonathan Rennington absconded, and still continued absent from the state of New York; and that afterwards, to wit, on the 28th of February, 1799, they sued out an attachment against him, under the "Act for relief against absconding and absent debtors;" under which his estate and effects were seized and sold, but did not produce more than 10s. in the pound, so, "on the said 1st day of May, 1799, and long before, the said Jonathan was insolvent, and not able to pay and satisfy the said bond." That they, afterwards, on the 1st of May, *1799, caused a writ of [*428] *capias ad respondendum* to be issued against him, which was returned not found; whereon they, on the 10th of August, 1799, caused an *alias capias ad respondendum* to be sued out, which was also returned not found, and that they had not been able, by the means aforesaid, to compel payment of the several sums of 1,000 dollars, due on the 1st of May, 1799, nor of the sum of 1,000 dollars due on the 1st of May 1800; by reason whereof the defendants became liable to pay the same. Nevertheless they had not paid the same, &c. and so the said Abraham and Conradt say, the said George and Benjamin have not kept their covenant so made as aforesaid, &c.

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The defendants (after demanding *oyer* of the bond, condition, assignment, and covenant) pleaded in bar,

1st. That the plaintiffs "did not use all due diligence, and take all legal measures by prosecution at law, to recover the said bond immediately after the said several sums mentioned in the condition thereof, respectively became due," and this they are ready, &c. wherefore they pray, &c.

2d. By protestation denying that Rennington was, at the several times above mentioned, insolvent, or was, and yet is, unable to pay and satisfy the said bond; they further pleaded, that when the first instalment of 1,000 dollars, with interest, became due, on the 1st of May, 1798, Rennington did not, nor hath since paid the same; so that the bond then became forfeited, immediately after which the plaintiffs did not, nor until long afterwards, to wit, on the 1st of May, 1799, take any legal measures on the bond against the obligor; and this, &c. Wherefore, &c.

3d. That they did not prosecute in like manner for the instalment due in May, 1800.

4th. As to the instalment due in May, 1799, that Rennington at the time of executing the bond in question, transferred also, as a further security, a mortgage on lands in Rensselaer county, which they had assigned, together with the bond, to the plaintiffs, who, on the 1st of November, 1799, sold the premises for 1,510 dollars, and thus paid themselves the instalment of May, 1799.

[*429] *5th. As to the instalments due in May, 1799, and May, 1800, that Rennington, after the 1st of May, 1799, and before the 1st of May, 1800, to wit, on the 1st of November, 1799, paid and satisfied to the plaintiffs the several sums of 1,000 dollars due by the condition aforesaid.

To the 1st plea the plaintiffs replied, payment of the 1,000 dollar instalment, due in 1798, on the 1st of May, according to the condition; and as to the sum of 1,000 dollars due on the 1st of May, 1800, Rennington's absconding on the 25th of December, 1798, and due diligence as to the instalment of 1799.

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To the 2d, payment by Rennington, of the 1,000 dollars due in 1798.

To the 3d, that before the sum therein mentioned became due, to wit, on the 25th of December, 1799, Rennington absconded.

To the 4th, that they had not been paid the 1,000 dollars, due in May, 1799, by the sale of the mortgaged premises, as the defendants in their 4th plea had alleged.

To the 5th, that Rennington had not paid the instalments of 1799, and of 1800.

To the 1st replication, the defendants demurred generally.

To the 2d rejoinder, that Rennington did not pay as the plaintiffs had replied, and issue thereon.

To the 3d, a general demurrer.

To the 4th, rejoinder, that the plaintiffs were paid, and issue thereon.

The demurrers were now argued by *Harrison* and *Emott*, for the defendants, and *Van Vechten* and *Woodworth*, for the plaintiffs.

For the defendants. This is an action of covenant, and is brought before the court on two demurrers by the defendants to the first and third replications of the plaintiffs. The pleadings are by no means intricate, and though it might be sufficient to confine ourselves to the demurrers only, yet it is conceived the declaration itself is defective, and therefore, the plaintiffs can never recover. The declaration states a *bond from Rennington to the Tibbits, conditioned for payment of 4,000 dollars, with interest, by instalments of 1,000 dollars each; that the whole of this being unpaid, on the 19th of January, 1797, the defendants assigned the bond to the plaintiffs, and, at the same time, entered into a covenant to pay it themselves, in case Rennington should become insolvent, or unable to pay it, provided the plaintiffs should use due diligence by course of law, and all legal measures "to re-

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cover the same *immediately after the several sums of money should respectively become due.*" It then further states a payment of 1,000 dollars, due on the 1st of May, 1799, before which time, on the 25th of December, 1798, Rennington absconded; that on the 28th of February, 1799, an attachment issued against his estate and effects under the absconding debtors' act, by virtue of which his property was sold, and produced not enough to pay 10s. in the pound; and so the plaintiffs state, on the 1st of May, 1799, and long before, he became insolvent, and unable to pay his bond. Then a *capias*, and an *alias capias ad respondendum* is stated, with *non est inventus* returned to each; whereby the plaintiffs were unable to compel payment of the instalments according to the terms of the condition.

Our first objection is, that the action will not lie till the whole money is due, not till after the first of May, 1801; whereas the present suit was commenced in 1800. This appears from the covenant. The words are, "not able to pay and satisfy the said bond." A person may be unable in 1800, yet fully competent in 1801. A single default is not sufficient; and even if the suit might have been instituted when began, the averment, in that case, does not go far enough: it ought, on the principle just mentioned, to have stated the insolvency, &c. to have continued till the commencement of the action; for, after May, 1799, and before suit brought, Rennington might have been adequate to every demand. The "and so," therefore, of the declaration, that Rennington was insolvent, is not warranted by the circumstances preceding, and the averment inconclusive; nor does a person's being absent, and his goods sold under the attachment set forth, prove insolvency [*431] or inability. A man, though *out of the jurisdiction of this court, may be able to pay his debts here, though his property should be abroad. This, therefore, is equally an insufficient allegation. The averment ought to have been direct and independent, not drawn by

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way of agreement; for then it might have gone to a jury, and they might have presumed him insolvent.

But, allowing this to be against us, it does not appear that due diligence has been used.

The covenant is, to use due diligence by prosecuting at law. This has not been done. There is a difference between using due diligence and prosecuting at law. The plaintiffs ought to have done both, and not one only. To show the diversity; suppose Rennington had had the money in his hands, and had said to the plaintiffs that he would pay it if they would call; instead of which, they do not call, but proceed, and Rennington afterwards becomes a bankrupt. This would be taking legal measures, but not using due diligence. The declaration itself shows a want of diligence. The proceedings under the insolvent debtors' act were had in February, 1799; it does not, however, appear that the plaintiffs ever made any proofs of their debt; or ever demanded a dividend from the insolvent's estate. They do not even seem to know what it will produce; they state generally that it will not pay 10*s.* in the pound. This surely, then, is a want of diligence, and legal measures. Nay, what has been done by them is on the face of it ineffectual: they have only sued out an *alias capias ad respondendum*. They should have gone on to outlawry, because, by this means, a judgment would have been obtained, on which the plaintiffs might have taken the body or the property in execution. The not stating in the declaration payment of the instalment in 1798, is also an objection. For if not paid at the day, it was the duty of the plaintiffs to have then proceeded; this ought to have been made appear, because, if the 1,000 dollars were neither paid nor sued for, the plaintiffs lost all right to look to the defendants for any future sums. This will be deemed no more than a fair consequence; for had, in May, 1798, *a suit been prosecuted, judgment would have [*432] been recovered for the whole penalty, which would have stood as a security, and would have bound the lands

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of the obligor. As, therefore, nothing of this sort is stated the declaration is in itself wholly defective.

For the plaintiffs. The plaintiffs come before the court as fair purchasers; therefore, should they recover any thing it is only getting back their own, and the defendants are not injured. The question is, what does the law require that they should do before they can have a right to recover. This, we are told, cannot arise till all the instalments are due. The words of the bond and covenant are an answer to this; for they are, that the money is to be paid by instalments, and *that*, as they become due, measures are to be taken for their recovery; on failure of which, the defendants are to pay such sums as may be "*then*" due. It is incongruous to suppose a bond to pay by instalments should not be put in suit till the last instalment is due; and it is equally so, that a covenant to pay, if such bond should not be faithfully discharged, must rest unavailed of, when the bond is not complied with.

The argument against the declaration, for not setting forth the payment in 1798, cannot be maintained. Nothing more is necessary than to state a right to resort to the defendants; *that* did not accrue till 1799. They are called upon for nothing previous, and if we are satisfied as to the payment in 1798, it is all the better for them, who are liable for every separate portion of the whole. Neither can the averment be objected to; we state Rennington became, and was, insolvent. The covenant requires no more; it does not exact a continuance of his insolvency to be shown. If he was at any time unable to pay, it is sufficient; for the covenant does not require that we should wait till he becomes solvent again. If this reasoning is good in one instance, it is in a thousand, and may be insisted on over and over again. We show the insolvency by the absconding, and proceedings under the absconding debtors' act; the non-payment on the 1st of May, 1799, and the legal measures taken by issuing the writs mentioned.

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The next objection *is the want of due diligence. [*433] We are required to institute suits only as the sums become due; that is all the diligence required. The instalment of 1798 must be presumed to have been paid; unnecessary, therefore, to sue for that; and a writ did issue for the one in 1799. To continue proceedings on to outlawry, without any chance of recovery, was not only useless, but would have been unjust, as all the costs would have fallen on the defendants, the record itself showing every part of Rennington's property assigned under the law against absconding debtors. It could, therefore, never have been the intention of the parties to thus unnecessarily saddle themselves with expenses; and it is a general rule, that covenants and conditions should be so expounded, as to serve the intention of the parties. This species of diligence could, therefore, never have been contemplated. The covenant of the defendants was in case of Rennington's insolvency, or inability, to place themselves in his situation, and pay, as he would have done, by instalments. The inadequacy of the estate of Rennington to pay more than 10*s.* in the pound, is a proof of his incapability, and it does not appear that even *that* has been paid, or could have been received. Allowing Rennington to have property abroad, and so, *in fact*, not insolvent, we are not to look to any thing beyond this state, and the jurisdiction within which the covenant was made. On our part, nothing appears to bind us to prove our debt. It was not our duty; the defendants are the legal creditors, and we could, at the most, be only trustees. They, therefore, having the legal right, are the parties who ought to have come forward to substantiate the demand. As to the payment of 1798, we are at issue on that, though, we suppose, whether paid or not, is immaterial; for, as we may now remit the whole, and exonerate from all, we surely have the same right over a part.

Harrison, in reply. That the intent of the parties is to govern, we are on both sides agreed. What that is, must

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however, be shown from the instrument; nor can the court look beyond it. The cases in which the defendants are to be liable, depend on conditions precedent. If so, [*434] then not *only an insolvency and inability in Rennington to pay must be shown, but instantly afterwards, due diligence and legal measures. Even the insolvency and inability is not shown positively; it is only "*et sic.*" Now a seizure and sale of all a man's estate and effects in *one county*, and their being insufficient, is not enough; there may be more than enough to pay all his debts in another. In *trover*, a demand and refusal is evidence of a conversion; yet, if stated in the pleadings, that the articles by finding came into the hands of the defendant, who, on demand, refused to deliver them, and so he converted them, it would not be good, because the demand and refusal might not amount to a conversion. The necessity of further proceeding than the mere issuing a *capias* and an *alias capias* will fully appear, if it be considered, that had a judgment been obtained, it would have bound subsequently acquired lands, and even in the hands of executors. Besides, the diligence covenanted for requires more. The plaintiffs held the only evidence of the debt due from Rennington; this they ought to have proved under the assignment made by virtue of the absconding debtors' act, that those for whom it was held might come in for the benefit of a dividend on the amount. Allowing, therefore, the insolvency, and our liability, the court will necessarily say we are, on this ground, discharged. The passing over the first instalment is not quite clear. It is contended the plaintiffs might remit that payment. No such thing; for if unable, and in tottering circumstances, legal steps ought to have been instantly taken, and a judgment obtained for the amount of the whole bond to give that priority and lien which now is lost. It was giving time, and that will make the debt the plaintiffs' own. The obtaining payment of the first instalment was a condition precedent to our liability, and ought, therefore, to have been shown.

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As it has not, the defendants cannot be called on in this action.

THOMPSON, J. The exceptions taken to the declaration are,

1st. That no action could be maintained on the covenant against the defendants, until the last instalment on the bond fell due, which was in May, 1801. The present action was commenced in 1800.

*2d. The insolvency, or inability of Rennington [*485] to pay, is not sufficiently averred.

3d. It does not appear that due diligence has been used against Rennington, to recover the money.

4th. No notice is taken of the payment that fell due the 1st of May, 1798.

I think all the objections untenable. The reason urged in support of the first is, that although Rennington might have been insolvent in the year 1799, the time alleged in the declaration, he might not have been so in the year 1801, when the last instalment fell due; and that the covenant only goes to the eventual responsibility of Rennington. This construction appears to me not warranted, either by the terms of the covenant, or what may reasonably be presumed to be the intention of the parties. The bond is made payable by instalments; the general object of the covenant was, to make the defendants responsible for those payments, and a fair interpretation would be, unless a contrary intention was clearly inferrible from the terms of the covenant, that they became security to pay, according to the condition of the bond, in case of Rennington's insolvency, or inability to pay. This construction is conformable to the general intent and understanding of parties with respect to securities, and there seems nothing peculiar in the phraseology of this covenant, to warrant a different conclusion. The covenant expressly refers to the bond, and purports to guaranty the payment, I think, according to the condition; and if so, there is a breach of

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the covenant, whenever there is a failure of payment agreeable to the terms of the bond. The assignees have pursued the obligor according to the provisions contained in the covenant. If this covenant would warrant a different construction, it would be, I think, that the whole sum was payable by the defendants, immediately on the insolvency of Rennington, for the covenant concludes, that then, and in such case, (alluding to the insolvency,) they were to pay "*the amount of the said bond, or such part as remained due.*" The result, however, as it respects the present question, would be the same on either construction. The insolvency, or inability of Rennington to pay, appears [*436] *to me to be fully and sufficiently averred. The averment is in the very terms of the covenant, to wit, that on the said 1st day of May, 1799, and long before, the *said Jonathan was insolvent, and not able to pay and satisfy the said bond.* It is said, however, this is a dependent averment, and is alleged as a conclusion drawn from a detail of facts, and which do not warrant the inference. The facts stated, appear to me fully to warrant the conclusion drawn. They are, that Rennington had, some time previously, absconded, and departed from this state to parts unknown, and still doth continue absent from the state, at some place unknown; that he had been duly proceeded against as an absconding debtor; and that the result was, that his estate was not sufficient to pay his creditors 10s. in the pound. It was admitted, on the argument, by the defendant's counsel, that if the averment had been general that Rennington was insolvent, and unable to pay, without detailing the facts from which the conclusion was drawn, the declaration would have been good. Admit the declaration to have been thus drawn, and issue had been taken upon the solvency of Rennington, and the facts detailed in the declaration had been proved on the trial, would they not have warranted the jury in pronouncing him insolvent, or unable to pay the bond? I think, clearly, they would. These facts being admitted by the demurrer, I think the court is

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bound to make the same conclusion. It is also said, the plaintiffs ought to have shown how much they had received on a distribution of Rennington's estate among his creditors. This appears to me to be rather matter of defence, and incumbent on the defendants to prove. If the plaintiffs had received anything, it would have been proper evidence, under plea of payment by Rennington. Besides, the declaration does contain an averment that they have not received payment for the instalments, for which the action is brought.

The third exception is, that the plaintiffs have not shown due diligence in prosecuting Rennington; that they ought to have proceeded to outlawry. I think it manifest, that such *extraordinary proceedings* were not in contemplation of the parties; and, therefore, that the covenant ought not to *receive such a construction as to make them [*437] requisite, unless clearly warranted by the terms.

The plaintiffs were to use all due diligence, and take all legal measures, by prosecution at law, to recover the money from Rennington; by which I would understand, all ordinary legal measures, prosecuted with good faith. In the present case, the plaintiffs allege, that soon after Rennington absconded, proceedings were commenced against him as an absconding debtor, and prosecuted with due diligence, in order to secure his property; and for the purpose of arresting his person, ordinary process issued on the very day the payment fell due; all which, I think, show due diligence, sufficient to satisfy the terms of the covenant, and the intention of the parties.

The last exception is, that no notice is taken of the payment that fell due on the 1st of May, 1798. It is, I think, a sufficient answer, to say that no demand is made on the defendants for that instalment: and the presumption is, that it has been paid, since the plaintiffs were bound to proceed against Rennington, as soon as the payment fell due, which they appear to have done with respect to the second instalment, the very day it became payable. Any

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delay, or *laches* of the plaintiffs in this respect, however, it appears to me, can only be alleged when a demand is made upon them for that instalment. It is said, that if a suit had been commenced on the bond for the first payment, the judgment would have been for the penalty, and would have been a security on his property for the future payments. This objection fails, without assuming several facts of which nothing appears. No evidence that there was any default with respect to this payment; or, but that a suit was commenced, and satisfaction made before judgment, or that he had any real estate which the judgment would have bound. If there were any circumstances of this kind, whereby any loss might probably be sustained for want of due diligence in procuring payment of the first instalment, it might have been proper evidence for the defendants to have availed themselves of on the issue with respect to due diligence, but can never be ground for the demurrer to the declaration. I am, therefore, of opinion, that [*488] neither of the *exceptions are well taken, and that the plaintiffs ought to have judgment.

RADCLIFF, J. The first and principal objection is founded on a strict and literal construction of the terms of the covenant. The bond is conditioned for the payment of four annual instalments of 1,000 dollars each. The defendants assigned this bond to the plaintiffs, and covenanted that in case the obligor should become insolvent, or not be able to pay the *said bond*, and if the plaintiffs should use due diligence, &c. to recover *the same* "immediately after the said several sums of money expressed in the condition, should respectively become due, and should not be able to compel the payment thereof, then the defendants would pay to the plaintiffs the amount of the said bond, with interest, or such part thereof as should then remain due." It was contended by the defendants' counsel, that by the terms of this covenant, the defendants cannot be held to pay, until all the instalments shall become due; because the covenant is entire,

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and contemplates a single payment of *the amount of the said bond, or such part thereof as shall remain due*. Confined to these terms, it would be susceptible of this interpretation. But, I think, it would equally admit of the opposite construction; that on the failure of the obligor to pay the first instalment, the defendants should be liable to pay the whole. The event in which the defendants were to become answerable, was the *insolvency* of the obligor, or as it is expressed in the covenant, if he should not be able to pay the *said bond, &c.* and if the plaintiffs could not recover *the same*, (the bond,) that the defendants would pay the amount of the *said bond*. If the obligor was not able to pay *the bond*, and the plaintiffs not able to recover the bond, immediately after the respective *instalments* became due, then the *casus* occurred, and the defendants were to pay *the bond*, not any particular instalment. Now, if the term *bond* is to be construed in the same sense throughout this covenant, as the penalty would become legally forfeited on the failure of the first payment, the defendants, according to the letter of their engagement, might be considered liable to pay the whole bond. There is an additional reason, too, in favor of this *construction; for, the moment the insol- [*489] vency of the obligor happened, there could remain little hope or expectation of recovering the subsequent instalments from him; and it might rationally be intended, that the defendants should at once take back their security against him, and pay the plaintiffs the consideration of the assignment which they had already received. But I think either of these constructions too rigorous, and opposed to the intent of the covenant. The bond was due to the defendants by instalments. The sums in the condition were, in reality, the debt. By the assignment, they meant to substitute the plaintiffs in their stead, and they guarantied the solvency of the obligor, and the payment by him, according to the terms of the condition. This was the substance of the contract, and the foundation of the covenant; which, I therefore think, ought to be taken distributively.

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and deemed a continuing covenant, on which the defendants would be liable on the failure of the payment of each instalment.

With respect to the other objections which have been stated, I acquiesce in the opinion already delivered, and, generally, for the reasons which have been assigned.

I am, therefore, of opinion, that the plaintiffs are entitled to judgment on the demurrers.[1]

KENT, J. This case comes before the court on demurrer to the first and third replications. Upon the argument of these demurrers, the counsel for the defendants relied upon what they contended to be substantial defects in the declaration. It was there that the first fault was to be found, and to which they choose to resort.

The action was commenced in July term, 1800, and the last instalment on the bond was payable on the 1st of May, 1801; and it was contended, that the defendants were not liable upon their covenant until all the moneys on the bond became due. An important question accordingly arises on the construction of the covenant. It was to pay *the amount of the bond, with interest, or such part as should remain due and unpaid*. But there were two conditions precedent to recovery upon this covenant.

[*440] *1st. That the obligor should become insolvent, or not able to pay and satisfy the *bond*.

2d. That the plaintiffs should have used all due diligence, and have taken all legal measures, by prosecution at law, to recover *the same*, and that, too, immediately after the several sums of money should respectively have become due, and should not have been able, by such means, to have compelled the payment *thereof*. The bond was payable by

[1] See *Loveland v. Shepard*, 2 Hill, 139; *Eddy v. Stanton*, 21 Wend. 355; *Curtis v. Smallman*, 14 Wend. 231; *Morris v. Wadsworth*, 17 Wend. 103; *Herrick v. Borst*, 4 Hill, 650; *White v. Case*, 13 Wend. 543; *The People v. Jansen*, 7 J. R. 332; *Lamoureux v. Hewitt*, 5 Wend. 307; *Barker v. Shepard*, 11 Wend. 629; *Cumpton v. McNair*, 1 Wend. 457; *Moakley v. Biggs*, 19 J. R. 69.

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instalments, and there can be no doubt but that the obligor was liable to suit on default of payment of any of the instalments. *Coates v. Hewitt*, 1 Wils. 80; *Hallet v. Hodges*, Sayer, 29; Buller, 168; *Marsen v. Touchet*, 2 Bl. Rep. 706. As to the cases in Co. Litt. 292, b. and 1 H. Bl. 547.(a) they relate only to *debt* on simple contract, or single bill. But the covenant was not, by the terms of it, to indemnify by instalments; it was to pay *the amount of the bond*; and that, too, only upon the condition that the obligor was not able to pay *the bond*, and that the plaintiffs had used all legal means to recover the same, immediately after the sums had respectively become due, and had not been able to compel payment. The language of the covenant throughout has reference to the bond as one entire debt, and the payment to be made by the defendants, in pursuance of the covenant, was of one aggregate or entire sum; or, so much thereof as should remain unpaid. I am of opinion, therefore, that the defendants were not liable on their covenant, until all the payments on the bond had become due. The burden of suing and collecting the instalments was, by the assignment, cast upon the plaintiffs; and if they could resort to the defendants on the first, or any default prior to the ultimate one, they must be entitled to recover the *whole amount of the bond* from the defendants before all the instalments were due, and before the legal means had been used to ascertain whether the obligor was, or was not, competent to pay. This would be contravening the express words of the covenant, which were, that the defendants were not to pay until all such means had been used, as the instalments respectively became due. It would be casting back upon the defendants the burden of using these means, which the plaintiffs had, by the contract assumed. These conse-

(a) *Rudder v. Price*. See *Hunt's Case*, Owen, 42. 1 Leon. 208. *Bishop v. Young*, 2 Bos. & Pull. 84, where Lord Eldon says, "Whether the instalments on the note in *Rudder v. Price*, were due or not, still the form of the action was misconceived." N. B. It was debt by the payee against the maker; *quare* therefore, as to this.

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[*441] quences *appear to me to result from the doctrine maintained by the plaintiffs, and they are too inconsistent with the covenant to be admitted. If, however, the plaintiffs were not entitled to recover the whole amount of the bond, but only the amount of the instalment in arrear, then it would follow, that the defendants would be subject to different suits upon the covenant, as the defendants on the part of the obligor should respectively arise. But this consequence would be against the rule of law, that for one entire contract, there shall be but one action, and would subject the defendants to the manifest inconvenience of not having it in their power, by the return, and re-ownership of the bond, to try the experiment of legal means on their part, against the obligor. For, I take it for granted, that while the plaintiffs were lawful owners of the bond, (and they would continue owners until default in the last instalment,) the defendants could not institute a suit upon it; for this might lead to the absurdity of concurrent suits, at the same time, on one instrument, for the same penalty, and for the use of different persons.

In every view which I can take of this covenant, it admits of but one construction. It was one simple and entire engagement. The insolvency of the obligor, and the efforts of the plaintiffs, were to be first shown with respect to *all* the instalments. It might be, that the obligor would return, and be able to pay the bond when the last instalment fell due. The present suit being brought before this period, was prematurely brought, and before the cause of action arose. I am, therefore, of opinion, that, on this ground, judgment ought to be given for the defendants.

There was another ground taken by the defendants, that might merit some consideration; I mean the want of an averment in the declaration, that the first instalment was paid, or that due means had been used to recover it. But it is not necessary for me, at present, to examine any other point than the one I have considered.

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LEWIS, Ch. J. The question now before the court is, has there been, on the part of the plaintiffs, a failure in the performance of the condition, on which the defendants covenanted *to pay, in the event of the inability or insolvency of the obligor? [*442]

It is contended on the part of the defendants, that the plaintiffs were not entitled to recover until the last instalment should have fallen due; and then only, on showing that they had duly prosecuted for each as they respectively became due. That the absconding of Rennington, and the proceedings against him under the absconding debtor's act, were not conclusive evidence of his insolvency. That though, perhaps, insolvent on the 1st of May, 1799, when the second instalment was payable, he might have been solvent at the time of the third or last instalment becoming due. That the terms "*all due diligence*" could only be satisfied by a prosecution to outlawry; and that the plaintiffs ought to have applied for, and received, their dividend under the assignment.

There are two events, in either of which the defendants engage to be responsible. The one is, *the insolvency of Rennington*; the other, *his not being able to pay and satisfy the bond*. These might be considered one and the same thing, were it not that the parties intended to distinguish between them. They are in the disjunctive; the one coupled with a condition, the other unconditional. The distinction, in the understanding of the parties, could be no other than *that*, between an incapacity in Rennington to discharge his debts generally, and a mere inability to discharge the bond according to its condition. In the first instance, the condition compelling the plaintiffs to prosecute would have been useless; in the second, it might eventually secure the debt.

The first question, then, is, was Rennington insolvent within the meaning of the contract? It is stated, and not denied, that he had absconded before the instalment payable in 1799; had absented himself from the state, and continued without it at the time of bringing the suit. That, also,

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previous to that period, his property had been assigned under the absconding debtor's act; and that it neated a dividend of but 10s. in the pound. On such assignment, the debtor's property is divested, his mercantile operations are suspended. No payments can be made to him, [*443] nor can he *dispose of his property. This, in my conception is a complete state of insolvency. Proceedings under the insolvent act are not necessary to constitute it. That act is intended as a benefit to the unfortunate, who must be *actually insolvent* before they can have relief under it.

But, admitting that in contemplation of the parties, no distinction was intended between the cases of the insolvency of Rennington and his inability to pay, according to the condition of the bond, but that, in every event, he was bound to prosecute on default of the obligor, has he not complied with such condition? On the very day on which the first default took place, he issued a *capias*; and, on its return, an *alias*. Rennington could not be taken being out of the jurisdiction. To prosecute to outlawry a man whose property had been already assigned for the benefit of his creditors, would have been a useless expense, and could not have added to the security of the debt. The law, therefore, would not impose it upon them. And as the suit was in the name of the defendants, and, in effect, for their benefit, they might have continued the prosecution, had they chosen so to do.

As to the plaintiffs' instituting a new suit on the second default, viz. on the non-payment of the instalment due in 1800, this, also, would have been useless. For, could a recovery have been had in the first suit, it would have answered every beneficial purpose. The judgment would have been for the penalty, and would have remained a security for the future instalments.

With respect to the plaintiffs not applying for a dividend, there appear two answers to the objection; 1st. It does not appear on the pleadings, that the dividend has not been

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received; 2d. The defendants were the proper persons to apply for it. They were the obligees originally, and when the assignment under the act took place, the possibility of recovery was defeated; they, by the terms of the contract, then became the substitutes of Rennington to the plaintiffs, and were to look to him, or his property, for an indemnity. On every ground, I am of opinion, judgment must be for the plaintiffs.(a)

Judgment for the plaintiffs.

(a) Covenant by the endorsee of the payee of a note not negotiable, to pay to his assignee the amount, in case such assignee should take all, and every legal step to prosecute to effect the maker and payee. The assignee having been nonsuited in Massachusetts, in an action against the maker, by the payee's coming into court and disavowing any authority to sue in his name, it was held that covenant might be maintained against the assignor without proceeding against the payee. *Betts v Turner*, 1 Johns. Cas. 65, S. C. reported in 2 Caines' Cases in Error, 305, where the opinion of Kent, J., (which seems the better law, and in which Lansing, Ch. J., concurred,) is stated as the decision of the court, whereas it was *contra* that of the majority of the bench. The author of this note, and the profession at large, are under obligations of no small weight to Mr. Johnson for this, and perhaps some other corrections in 2 Caines' Cases in Error. "Inaccurate reports" being, as is justly observed in the preface to 1 Johns. Cas "the bane of legal science." It is, however, to be regretted, that the learned editor of those cases did not advert to the decisions in the supreme court, which had been antecedently published. It would have saved to the bar the repurchase of many determinations in Coleman, which follow nearly in succession, and nearly in *totidem verbis*, in Johnson, as well as some which hardly vary from the statements in Caines. The accident has probably arisen from Mr. Justice Radcliff having been on the bench when all the cases were decided, and having handed over to Mr. Johnson the whole of his notes, without discriminating those determinations which had already appeared.

Jackson v. Reynolds.

[*444] *JACKSON, *ex de'n.* LOW and others, *against* REYNOLDS.

If a defendant has acknowledged the title of the plaintiff, he cannot afterwards dispute it.

THIS was an action of ejectment to recover part of lot No. 37, in Romolous, in the county of Cayuga.

On the trial, the plaintiff deduced a regular title from the original patentee. He also gave in evidence, acknowledgments of the defendant's confessing that he had entered without title, and that he had agreed to purchase of the lessor of the plaintiff, the premises in question, so soon as the Onondaga commissioners should award the lot in which they were contained, to Low. He further proved, by the testimony of one of the commissioners, that lot No. 37, had been awarded to Low, and the award directed to be made out by their clerk, who, however, died in February, 1801, before it was completed; in consequence of which, as their commission expired in March of the same year, nothing further was ever done.

The defendant relied on his having entered by virtue of a conveyance from another, though for another lot, and offered parol testimony of a dissent having been entered to the award of the commission; insisting, that as parol testimony had been received of the award, so it was admissible to show the dissent. This being overruled, the jury, in pursuance of the judge's charge, found for the plaintiff.

Application was now made to set aside the verdict, on account of misdirection.

Per Curiam. Reynolds has, by his admissions, (a) recog-

(a) The principles upon which admissions of a party to the record are evidence against him, are, that a man cannot be a witness for himself, nor a party to a record compelled to testify, out that every man is the best possible witness against himself. This technical legitimization of evidence, by admis-

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nized Low as his landlord; he cannot, therefore, be admitted to dispute his title. Whether, therefore, the evidence was properly or improperly received, cannot be inquired into, nor can the defendant take any thing by his motion.[1]

Motion denied.

sion, is carried so far as to apply to mere trustees, though their acknowledgments go to defeat the action. *James v. Hatfield*, 1 Stra. 548. *Baserman v. Radenius*, 7 D. & E. 663. As the admissions of trustees who are parties to a record, are good testimony against them merely because they cannot be compelled to testify, it follows that the admissions of a *cestui que trust* who can be compelled, are not; nor are those of a person under whom the defendant in replevin makes cognisance, because such persons may be examined in chief. *Hart v. Horn*, 2 Campb. 92. So an affidavit by the plaintiff on record, if *bona fide*, is evidence for the defendant in an action by an assignee of a bond suing in the name of the obligee. *Craig v. D'Aeth*, 7 D. & E. 670, n. In the note to *Andrews v. Beecker*, 1 Johns. Cas. 411, the point of the decision in the case last cited, does not seem to be accurately stated by the learned reporter. It is taken from the statement of Erskine *arguendo* and adduced as in opposition to the judgment of the court in the text; as deciding that a release from a plaintiff on record, shall defeat the beneficial interest of a person suing in the name of the plaintiff. The true point determined was, that a *bona fide* release from an obligee beneficially interested, who was also the plaintiff on record, and for whose use and benefit the bond had been assigned in trust, shall prevail against a *fraudulent* assignment to a nominal plaintiff, the facts of the trust for the benefit of the obligee, the fraudulent assignment by the trustee, and the *bona fide* release to the defendant, being found for him on two several issues. "These cases," says Buller, J., in *Legh v. Legh*, 1 Bos. & Pull. 447, "depend on circumstances. If the release be fraudulent the court will attend to the application."

[1] See *Northrop v. Wright*, 24 Wend. 221; *Jackson v. Leek*, 12 Wend. 106; *Jackson v. Spear*, 7 Wend. 401; *Jackson v. Anderson*, 4 Wend. 474; *Jackson v. Denison*, 4 Wend. 558; *Jackson v. Cooley*, 2 J. C. 223; *Jackson v. Dobbin*, 3 J. R. 223; *Jackson v. Scissam*, 3 J. R. 499; *Brandier v. Marshall*, ante, 394, and note [1] thereto.

Bordes v. Hallet.

BORDES, Jun. *against* HALLET.

Neither an acquittal, nor a restitution of goods, prejudice an abandonment once duly made. In case of a restitution of goods to the owner at the port into which a vessel is carried, he is not bound to send them on to their port of destination. Though an adjustment made by the agent of the outdoor underwriters (Mr. Ferrers) does not conclude the insurers from showing errors in it, if they do not dissent, they are bound.

THIS was an action on a policy of insurance, dated the 21st May, 1800, to recover the amount of a trunk of merchandise valued at 800 dollars, and the expenses incurred in claiming the property in a foreign court of vice-admiralty.

[*445] *The cause was tried before Mr. Justice Radcliff at the sittings in November, 1802.

The case, as it appeared in evidence, was as follows :

The plaintiff shipped the articles in question, on board the schooner *Trimmer*, bound from New York to St. Jago de Cuba. On the 18th of May, 1800, he embarked with his property in the vessel; which, during the course of the voyage, was captured and carried into the port of Kingston, in the island of Jamaica, where she and her general cargo were condemned; but the trunk of the plaintiff, for which he had interposed a claim, was acquitted. Notwithstanding, however, this acquittal, and the decree for restoration, the agents of the captors refused to deliver it up, unless the plaintiff would give security^(a) for its value; which, as a stranger, not being able to procure, they actually opened and took out the contents of the trunk, and the same were, for want of the security demanded, left in their hands.

On the return of the plaintiff to New York, in November, 1800, he abandoned to the defendant, and duly notified

(a) It seems from this, that the captors had entered an appeal from that part of the sentence, acquitting the trunk; in which case they were not bound to deliver the property, without security for paying the value, in case of a reversal.

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him of all the antecedent circumstances. He also, after proving his interest by a bill of lading, signed and acknowledged by the captain, submitted an account of his expenses in the prosecution of his claim for the goods insured; which in an average account, apportioning the whole, was settled on the back of the policy, at 9 dollars and 48 cents per cent, by Mr. Ferrers, who acts for the defendant and other underwriters in adjusting claims against them. Mr. Ferrers, however, testified, that though he was thus employed, and though the underwriters did usually assent to, and pay according to his reports; still, he had no binding authority on them, for that they often disputed his statements; notwithstanding they had not, to his knowledge, on the present occasion, either assented to or dissented from the calculation he had made.

To this testimony, the counsel for the defendant objected, and insisted that the plaintiff was not entitled to recover. A verdict was, however, taken by consent, in favor of the plaintiffs, for 978 dollars and 74 cents, subject to the opinion of the court on the following points:

*Whether the plaintiff was entitled to recover [*446] for a total loss, and the expenses? If so, the verdict to stand. But if, in the opinion of the court, the plaintiff was not entitled to recover for the expenses, but for a total loss of the goods, then the verdict to be reduced to 902 dollars and 90 cents; and if the plaintiff was not entitled to recover for a total loss, but for expenses only, then the verdict to be entered for 75 dollars and 84 cents; otherwise, a verdict to be entered for the defendant.

Hoffman, for the plaintiff. From the facts presented to the court, it is manifest there was a capture of the vessel. This operates as a technical total loss, and, therefore, whether an acquittal subsequently took place or not, is immaterial; for the capture alone is sufficient to warrant the abandonment. After this, the assured, who, from the moment of capture becomes the agent of the assurer, returns,

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and making a full avowal of what had taken place, says, I have done all I could; but the event does not alter the law, I am now, for the first time, able to communicate with you and abandon. It is not however, from the capture alone that the plaintiff is entitled to abandon. A loss of the voyage affords an equal right. Here the goods were bound to St. Jago de Cuba, and the vessel was carried into Jamaica, where she was condemned. The only question that can arise is, whether on Mr. Ferrers' settlement of the average account, the defendant is bound to pay what he has endorsed on the policy to be due! But such is the ruin brought on this poor plaintiff, whose little all has been locked up by the refusal of the defendant to pay, ever since 1800, that rather than not have a decision on the principal question this term, he is ready to give up his expenses. As to those, without going minutely into the testimony, the question ought to resolve itself into this; what is the relative situation of Mr. Ferrers with the defendant? All claims, when made on the out-door underwriters, of whom the defendant is one, are referred to Mr. Ferrera. He gives his opinion whether liable to a total, or a partial loss. We do not say that when he gives his sentiments if he totally mistakes the law, that they are, on the facts submitted, obliged to pay a total, when only a partial loss is

[*447] *due. But when an average loss is acknowledged, and the settling it referred to him, and he adjusts the sum, then, as the agent of the underwriters, they are bound by his report. This is not by affording an authority to settle a point of law, but as yielding a power over *items* of an account, the principles of which they acknowledge. Nay, even allowing the underwriters not concluded as to the principles, still, if in law at all liable, the *quantum*, except in cases of erroneous calculation, can never be questioned. It is like the case of a person deputed to audit the amount of claims; when the balance is struck, it is, errors excepted, final. The doctrine already relied on as to the right of abandonment is not impaired by subsequent resti

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tution. For this the court will find authority in 2 Marsh. 484.

Pendleton, contra. A principal question in this cause is as to the expenses in the vice-admiralty. The claim for these rests only on the report of Mr. Ferrers; for this is the only evidence in the case that any were incurred. Such testimony, however, cannot bind the underwriters; for Mr. Ferrers himself states his employment to be merely that of reporting; after doing which, his statement is frequently disregarded, and his adjustment disputed. This would never be, had Mr. Ferrers an obligatory authority. The fact is, he is a mere examiner of accounts, and cannot bind his principals beyond the scope of his authority. He testifies that his principals have a right to dissent from his statements of which the present action is in itself the strongest proof. But a question is certainly made, whether the abandonment was in due season. The vessel sailed in May, was captured on her voyage, and the abandonment not made till November following. This, considering the distance of Jamaica, was a gross delay. We find, however, from the testimony of the captain of the vessel, that this property was acquitted. The plaintiff, therefore, might have had it again had he so pleased. It is a position not to be controverted, that every court is invested with power to enforce its own authority; therefore, if after restitution awarded, it was not obtained, it must have arisen from the neglect of the plaintiff, or some other worse cause; for, he might have applied to the court, and have obtained an order for it. In case of refusal, the process was easy, attachment for a contempt. See ante, note, 445. It is said, however, that as the voyage was lost, that circumstance would justify an abandonment. This will present a question to the court that has not, we believe, ever been decided. Whether an owner of goods, where the vessel in which he ships is incapable of proceeding on her voyage, by reason of any acci-

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dent, is not obliged(a) to proceed with his goods in some other vessel? Nothing of this sort appears to have been determined. Supposing him however, bound, ought not the assured, to entitle himself to a recovery, to show that no vessel could be obtained to forward the property; or ought the insurer to show, by way of defence, that there was? The principle is, that the captain ought to get a vessel, if such a one be to be found; and it is only in cases of necessity that he is authorized to abandon the voyage; if in his power to proceed, he ought to do so; had it been otherwise, it ought to have appeared in the case. 2 Marsh. 378. So in *Manning v. Newnham*, Park, 168, Lord Mansfield lays the stress of the case on the captain's not being able to get another vessel to go on. It is settled, that when the bottom is necessarily changed by shifting the goods from one vessel to another, the underwriter continues liable. Sending on the goods, therefore, in another ship, would not have exonerated the defendant; and as it was the plaintiff's duty, he ought to make out his case by showing another vessel could not be obtained. This, certainly, is more proper than for the defendant to be put to prove a vessel might have been procured; because the assured is to be presumed to have a correspondent where his property may be carried, but the underwriter is not. Besides, the plaintiff was on the spot, and as he might have procured restitution from the court of admiralty, he may, admitting all the evidence in the case to be true, be now in another country with all the property in his possession.

Hoffman, in reply. That it is the duty of an assured on goods, in case of capture and restitution to send on the articles to the port of their destination before he [*449] can be entitled to recover, is a position, till now, unheard of in insurance law. He may, perhaps, do it under the general clause, empowering him, or his agents,

(a) A ship-owner contracts to carry; a shipper does not; therefore, he who does not engage, can never be obliged to perform.

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to act for the insurers; and, if *bona fide* done, they may, perhaps, be liable. But no authority, we presume, can be had to change a neutral into a belligerent risk, as it is probable must be done, in sending from the port of a nation at war. But, allowing it to be as contended, it ought to come from the defendant, because it is urged as an excuse for not paying a total but a partial loss. The plain case is, there was a capture, and the voyage totally defeated. Either event will justify an abandonment. The restitution is for the benefit of the assurer, who may prosecute his claims upon it, by forcing the captors to go on with their appeal; but, on no principle can it be contended, that the assured must follow it up, to entitle him to recover. This would destroy the very intent of insurance, which is in case of loss, to put the underwriter in the place of the underwritten.

LEWIS, Ch. J. delivered the opinion of the court. The objections to the plaintiff's recovery, on this statement of facts, are,

1st. That he had no right to abandon after the acquittal of the property insured. See *Muir v. United Ins Co.*, ante, 53, note (a.)

2d. That the abandonment was out of time.

3d. That he was bound to have procured another vessel.

4th. That the defendant was not bound by the adjustment.

It is stated in the case, that the vessel sailed about the 17th of May, 1800; but when she was captured, or when condemned, does not appear. It appears, however, that though the trunk of goods, on which the insurance was made, was, by the sentence of the court of vice-admiralty decreed to be restored, the plaintiff could not regain the possession of it, and that he abandoned it to the underwriters, on the 22d of October following.

Within what precise period an abandonment ought to be made has never been determined. The time permitted to

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elapse between the condemnation, order of restitution, and abandonment in the present instance, cannot be inferred from anything in the case. It is certain, however, that the loss was total on the 22d of October, and has so [*450] continued *to the present moment. The voyage to St. Jago de Cuba, was completely broken up, and the plaintiff has never had it in his power to convey the goods thither, even had it been incumbent on him so to do, for he has not been able to recover the possession of them. There is no ground, then, on which either the first, second, or third objections can be supported. Had the plaintiff even recovered the possession of his goods, it would not, in my opinion, alter the case. No direct intercourse can be presumed to subsist between the colonial ports of two belligerents; and were the contrary the case, this is not a case imposing an obligation on the plaintiff to procure another vessel.

The fourth is rather an objection to the *quantum* of damages, than to the right of recovery. By the general permission in the policy, to alter, &c. without prejudice, &c. the insurer bound to an average of the expense incurred in the attempt to recover the captured property. (a) It is true, he was not bound by the adjustment of Mr. Ferrers, and was at liberty to have shown that it was erroneous. But this was not even attempted. A circumstance which, when taken in connection with the character and employment of the gentleman, will warrant the conclusion that his adjustment is correct. We are, therefore, of opinion, his adjustment is correct. We are, therefore, of opinion, his judgment is for the plaintiff, for the largest sum found by the jury.

Judgment for a total loss and expenses.

(a) It exceeded the amount of his subscription. *Lawrence & Whitney v. Watson & Clarkson*, 1 Caines' Rep. 276. *Watson v. Mr. Ins. Co.*, 1 Caines' Rep. 41.

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to indemnify against an escape, given after an escape suffered, is
 A judgment by default is not in itself fraudulent, and unless fraud
 be shown is within a condition to bear harmless from what the plaintiff
 might be obliged to pay "after due proceedings had against him, and
 adjudged and decreed."

DEBT by the sheriff of Albany, on a bond of indemnity dated 22d April, 1798. The declaration was in the common form.

The defendant in his plea, set forth the condition of the bond, reciting, that on the 10th March, preceding, two writs of *capias ad satisfaciendum* had been issued out of the supreme court against George Driggs: one, at the suit of Wendover and J. Hopkins, for 305 dollars: the other at the suit of B. Dudley, for 126 dollars, returnable on the third Tuesday in April in the same year; that George Driggs *had been taken*, on both these suits, by S. Hamilton one of the plaintiff's deputies; that the condition of the obligation *was, that if the defendant should pay [*451] all such sums of money, charges and damages whatever, as the plaintiff should be obliged to pay, after due proceedings at law had against him, and adjudged and decreed by reason of the *aforesaid taking* of the said George Driggs on the said writs, then the obligation to be void; otherwise, &c. The defendant then pleaded the statute for preventing vexatious and oppressive arrests, and, that the plaintiff took the writing aforesaid for ease and favor to George Driggs, and by color of the plaintiff's office.

2dly. That the plaintiff had not been damnified. To these pleas the defendant replied,

1st. That at the time when the bond was given, George Driggs was not a prisoner of the plaintiff, nor of Hamilton, on the writs of *capias*, but was then at large, and discharged from his imprisonment thereon; and that the bond was given to indemnify the plaintiff for taking George Driggs,

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and discharging him from the arrest and imprisonment aforesaid, traversing the ease and favor.

2d. That in April term, 1799, Wendover, survivor of Hopkins and B. Dudley, impleaded the plaintiff for taking and arresting the said George Driggs, and permitting him to go at large; that in July term following, judgment was obtained against the plaintiff, for the debts and costs in the above suits, averring, that he is bound and charged to the satisfaction of the judgments, and that he was damnified by the suits and judgments thereon.

Rejoinder; that the plaintiff, fraudulently and deceitfully, and with intent to deceive and defraud the defendant, permitted the said judgments to pass against him by default, and that he fraudulently and deceitfully neglected to make any defence to the said actions.

Surrejoinder; that the plaintiff did not fraudulently and deceitfully neglect to defend, nor did so suffer the judgments to pass against him by default and issue thereon.

The cause came on for trial before Mr. Justice Thompson, at the Albany circuit in September last, when the counsel agreed that the only two points in question were, [*452] *1st. Whether the bond in question was given for ease and favor and deliverance of the said George Driggs, contrary to the form of the statute; and, therefore, void?

2d. Whether the judgments aforesaid were entered through fraud and deceit of the plaintiff, or were negligently and fraudulently suffered or not?

The plaintiff proved that judgments in the two suits of Wendover and Hopkins, and of Dudley, were duly obtained, and executions regularly sued out against George Driggs. That Driggs was taken upon them *some time in March, 1798*, by one of the deputies of the sheriff, named Hamilton, and that, at the time of the arrest, many threatening observations were made, by the defendant and Driggs, in case the sheriff should detain his prisoner in custody, as they insisted he was not liable to be held, having lately obtained his

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discharge under the insolvent act; that at the same time, there was some conversation about giving a bond to try the validity of the arrest, and secure the sheriff in case Driggs should ultimately be liable to the above executions: that directions were given to one Frazer, the attorney in the suits against Driggs, to prepare such a bond; but before it was finished, the defendant told Frazer he need not go on, for that he (the defendant) would have nothing to do with it; that since the arrest, Hamilton had declared he had permitted Driggs to go at large; that Driggs went a journey to the westward, and the defendant said he would see him forthcoming in ten days; that Frazer did not consent to Driggs going at large, but on being asked, whether he could be regularly set free, on some person's undertaking for his return into custody, Frazer answered, so it had been practised by others; that Driggs had been seen, after coming back from the westward; and that Hamilton had been heard to say, Driggs had returned according to his agreement; that on the 23d April, 1798, the bond, on which the present action was instituted, was drawn by Frazer, at the request of Hamilton and the defendant, when Driggs was not present, and that it was executed by the defendant at a house to which he and Hamilton went for that purpose; that the arrest took place on the 10th or 12th of March preceding, *between which time, and the [*453] 23d of April following, when the bond was executed, Driggs had been frequently seen in the streets of Loonenburgh, where he and Hamilton resided; that previous to the execution of the bond, Joseph Hopkins consented to its being given, and told Hamilton he would be safe if he took it; that, at the time of its execution, the defendant said he was not afraid of the bond, as he was positive his son's discharge was good; but, that he did not wish the sheriff to be hurt. The plaintiff here closed his case.

The defendant gave in evidence, by a witness present when the arrest was made, that Hamilton agreed with

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George Driggs, that he might go a journey to the westward; and that the defendant became his surety that he should return in ten or twelve days; that he *did* return within that time, and was delivered up by the defendant to Hamilton; that the attorney in the causes against Driggs said the sheriff would be safe in letting him go, if the defendant was surety for his return; that from Hamilton, it was understood, that Driggs was not his prisoner at the time the bond was given. Frazer's assent to Drigg's being set at large was denied by Hamilton, who said, he himself permitted Drigg's to go the journey to the westward, on condition of the defendant's undertaking for the return of Driggs, the prisoner; that he did come back, as was promised; but that Hamilton recollected no surrender of him into custody; that the defendant said he was willing to give a bond to indemnify the sheriff, and, on, Hopkins' consenting to the bond in question, it was executed; but that, the time of its execution, Driggs was absolutely at large, and had been so ever since his return; nor had the sheriff exercised any authority over him, as the deputy did not consider him in custody, in consequence of Hopkins' consent to the bond; that of such consent, the plaintiff, shortly after the suits against him were commenced, was informed, and that he had satisfied the judgments obtained therein against him, within about five pounds. On this testimony the jury found a verdict for the defendant.

The present application was for a new trial.

[*454] **Metcalf* and *Emott*, for the plaintiff. The motion now made is for a new trial, the verdict being contrary to law and evidence; and, it may be added, though it does not appear in the case, contrary to the opinion of the court also. It is an action of debt on a bond of indemnity, to which the defendant has pleaded that the bond was given by him to the sheriff for ease and favor. The first question is, whether the bond was so given, and therefore, void? The second, whether the judgments obtained

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against the plaintiff were deceitfully or negligently suffered? The first point includes matter of law and matter of fact. Whether a bond to indemnify a sheriff from an escape given subsequent to an escape, and when not in custody, be a bond for ease and favor, and, therefore, void by the statute, is the question of law? Whether the party was then in custody or not, is that of fact. By recurring to the testimony in the case, it will appear that Driggs, for whose ease the bond is alleged to have been entered into, was out of custody long before it was executed, and the very right of taking him was questionable, as he had been discharged under the insolvent act. Against what is advanced, the agreement to let him go, on a promise to return, cannot be urged; for, though he did return, he never was in custody, and the liberation itself, under the agreement, was an escape, *after which* the bond was given. Is, then, this bond such a bond as is made void by the statute? It expressly refers to bonds given for deliverance, and refers to one in *custody only. 3 Vin. Abr. 453, pl. 8, notis.(a) [*455] Ibid. 454, pl. 13.(b) 19 Vin. Abr. 445. A bond given to indemnify against past escapes, is good. *Fox v. Tilly*, 6 Mod. 225, which cites 2 Salk. 438,(c) Ibid. 553. So 5 Com. Dig. tit. Pleader, (2 W. 25,) p. 648. *Hacket v. Tilly*, 11 Mod. 93.(d) 5 Vin. Abr. 96, pl. 20. If, then, the law be so, the first defence is entirely false; for, it is not a bond under the statute, and therefore, is not void. Had any thing been said about its being given, at the time of liberating George Driggs, it might, perhaps, have been invalidated; but it was not only not then in existence, but not even contemplated. As to any fraud in the plaintiff,

(a) *Stepney v. Loyd*, Cro. Eliz. 647. The defendant was illegally arrested, and the bond held void as obtained by duress.

(b) On a *fi fa* the sheriff took a bond to pay the money into court at the return of the writ, and held good. 10 Rep. 99, b., *Bewjage's Case*.

(c) A bond to be a true prisoner, good.

(d) That was a bond from an officer to the sheriff, to indemnify against escapes. See Holt, 201.

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from suffering the judgments to be had against him, i. surely will not be contended *that* is proved, because they went by default. There might have been no defence, and then a judgment by default was the only honest one that could be had; for any other would have been dishonest, as it could have no effect but to increase costs. There was a clear escape, and a recovery was inevitable; for, no consent to the discharge of George Driggs was either given by Hopkins or the attorney in the suit. None of the words made use of imply it; they only mean that as the plaintiff would be liable to Wendover and Hopkins, he might make himself secure by a bond; and to prove that this was the true idea the parties entertained, Hopkins, as survivor of Wendover, instantly commenced a suit against the plaintiff. Had there been a wish to exonerate the sheriff, and permit the liberation of George Driggs, Hopkins would have taken the bond to himself. At all events, Dudley did not assent, and whatever may be urged respecting Hopkins' judgment it cannot apply to that by Dudley; and to neither one nor the other of the suits, could the sheriff justify under the insolvency of George Driggs. In the case of *Lansing v. Fleet*, October, 1800, in this court, it was ruled, that a return into custody does not purge an escape; but, that the party may go at large again when he pleases. They, therefore, relied on that authority, in addition to those cited, to show that the bond could, not be for favor. Also 6 Mod. 127. 2 Leon. 89.(a) 1 Salk. 271. 10 Vin. Abr. 111, M. 1.

Spencer contra. If it be made appear that the [*456] plaintiff *cannot, under the present state of pleadings, recover, though a new trial should be granted the court will certainly let the verdict stand. Where a jury have found against law, if sending back the cause be

(a) It is a citation from the year books, but, in my *Leonard*, from that of Henry the ninth. I have searched in Henry VI. and in *Brooke*, but do not find the case, which is, that a release by the plaintiff to his debtor who was in execution, is no plea in an action for an escape before the release.

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for a trifling purpose, and the damages small, the court will not interfere; *a fortiori* they will not, if they see no possible use can accrue. At the trial it was not made a point, whether, from the condition as set forth, the plaintiff could, under any circumstances, recover *for an escape*. The words are, that if the plaintiff should pay, &c. "*by reason of the taking of the aforesaid George Driggs.*" To the action on the penalty of the bond there are two pleas; one to the ease and favor; the other, that the plaintiff had not been damaged. The replication means to raise this fact, whether the bond was given after Driggs had escaped, and to indemnify for that, or to obtain his deliverance at the moment when executed. The action is intended to recover what has been paid for an escape suffered, and not in consequence of having arrested. The defendant has engaged for nothing but for the taking; he does not say for the suffering to escape. This is a clear departure in pleading. The count, as appears by the condition, is for a taking, and the replication shows damage by an escape. The question, therefore, which now arises is, whether it be competent for the plaintiff to aver a condition which does not appear on the bond. He cannot aver any thing which is not apparent. The bond is to indemnify only against *taking* on the writs. If Given cannot bring himself within the condition, he has no right to bring the action. Nothing can be averred which varies the condition. 19 Vin. 448, U. pl. 2. No averment against the condition of a bond. The contrary would overturn all legal principles of agreements, and on which the plaintiff resorts to recover damages. If there be a recovery, it must be by parol testimony directly opposite to the condition of the bond. With respects to the validity of the instrument, it is to be observed, that it is to indemnify for *taking* Driggs. When the writs were put into the sheriff's hands, he was to execute them: no security from a third person, to protect him from the consequences of doing his duty, can be good. But, admitting that it is valid, if the plaintiff cannot depart from

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[*457] *the condition, and in order to maintain his action he must do so, let the verdict be as it will, the court will not grant a new trial. For, suppose it was done, and a verdict for the plaintiff, a motion would be made in arrest of judgment for the variance; and as it appears on the face of the record that the condition is for the sheriff's not doing his duty, it is illegal, and the suit not to be maintained. Either of these reasons would be fatal, and both are certainly enough to warrant the refusal of a new trial. The second objection, stated in the rejoinder, still remains unanswered. The defendant was to be answerable only after *due proceedings* had against the plaintiff *by reason of the aforesaid taking*. These words preclude every idea of a default. The condition contemplates a payment after a trial had between the parties. Against all that is advanced on behalf of the defendant, it is urged, that if a party taken on execution escape, and afterwards a voluntary bond be given to indemnify, it would not be within the purview of the act. But this is not such a case. There were conversations at the time of taking, respecting an indemnification, and an agreement that George Driggs should be forthcoming. The whole testimony evinces this. Yet, were it otherwise, the law will not bear out the position of the other side. 4 Bac. Abr. 464,(a) is express, that if a party be taken, escape, return, and give bond to indemnify, it is void by the statute and common law.(b) On the point of fraud, the jury were the proper judges; it was submitted to them by the judge who tried the cause, and they have determined. The cases cited apply to transactions between the parties, and not to those between the sheriff and a stranger. It is relied on, that under no circumstances does this bond afford a ground for action, being void and nullity in itself; that the condition is to indemnify against the *taking*, and that evidence of damage from an *escape* cannot, therefore be adduced.

(a) The case alluded to is *Philips & Stone's Case*, 2 Leon. 118, but the debtor there was taken on a *ca. sa.*

(b) The authority does not go quite so far.

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Emott, in reply. We are here to argue on a question for a new trial. It is somewhat of a novelty, that we should be called on to speak against an arrest of judgment; all we have to show is, that on the pleadings the verdict is against evidence, and that we were entitled to recover. If the court will *look at the bond and testimony, [*458] they will see it was a bond to indemnify against an escape, and not against a mere taking. The intent of parties is always to regulate in matters of contract. The intent appears from the plea; for the defence is, that the bond was for ease and favor, which it could not be, if it was to keep harmless for taking alone. The testimony on both sides went to the point of ease and favor, and tended to show it was to indemnify, after a going at large, from actions of escape, which might be brought for that which had taken place. If there had been no taking, there could have been no escape; and, therefore, the bond, transactions, pleadings and testimony, all show that it was to indemnify for an escape which had long before been permitted. This objection, on the word *taking*, was overruled at the trial, as the judge must recollect, though it does not now appear.

THOMPSON, J. My recollection is confined to the case.

Emott. The dates stated, and before the court, will show that the bond could not be for ease and favor. The arrest was on the 10th or 12th of March. George Driggs was then liberated by the sheriff, and the bond not dated till the 22d of April following. *Lansing v. Fleet*,^(a) is in point to show that had George Driggs returned to the sheriff himself, he could not have been held, or considered as a prisoner. Where, then, could be the ease and favor in discharging a man that was actually at liberty? For the reason already given, a defence by the plaintiff to the actions against him, might have been highly improper; to show the judgments, therefore, fraudulent, it ought to be made

(a) Since reported, 2 Johns. Cas. 3

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appear that there was a good and legal defence, which the plaintiff neglected to make. This was afforded neither by the discharge under the insolvent act, nor by the words of Hopkins. It is worthy of observation, that it does not appear George Driggs ever was discharged under the insolvent law, as has been asserted. Nothing of the kind was proved at the trial, and nothing appears in the case: but had it been otherwise, the plaintiff could not have justified under it, for he could not take upon himself to determine on its legality, as it might possibly have been invalid from fraud. The only sections in the act [*459] for the relief of insolvent debtors, applicable to the present discussion, are the 7th, 11th, and 12th; the first, after authorizing a discharge from debts and imprisonment, goes on thus: "Which discharge, or the record thereof, shall be sufficient authority to the sheriff for setting such prisoner at large, and the discharge shall also be conclusive evidence in all courts, of the facts therein contained." The second authorizes the pleading of the general issue. The third declares, that if the insolvent be guilty of perjury, or fraud, the discharge shall be void. Two cases, therefore, and only two, are specifically provided for; that of an insolvent's being imprisoned at the time when the discharge is obtained, and that of his being subsequently arrested. In the first, he will be liberated on producing the discharge; in the second, he may plead the general issue, and give the discharge in evidence. It is a mere statutory release, to be taken advantage of like any other, and avoidable by proof of fraud. If therefore, the defendant meant to insist that it ought to have been used by the plaintiff, he should have shown it below, that the plaintiff might have rebutted it by proving fraud. But it never could have been availed of by the plaintiff, as the judgments on which the suits against him were founded are in existence. When the writs of execution against George Driggs came into the plaintiff's hands, it was his duty to execute them: to obey their precepts, not to judge of their effect; his duty being

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purely ministerial. On this head the law is so strict, that it will not permit a sheriff to set up a payment, without satisfaction is entered of a record. 6 Mod. 27. Nor a release. 2 Leon. 89. It is submitted, therefore, that as the defence would have been useless, it could not have been intended; that the bond being given when George Driggs could not be eased nor favored, could not be for ease and favor, and that, as no kind of fraud is imputable in the recovery on the judgments, the verdict is against law and evidence, and must, therefore, be set aside.

KENT, J. delivered the opinion of the court. There can be no doubt that the verdict is against evidence. The one issue is upon the allegation that no bond was given, and that it was for his deliverance from such custody. But the evidence on *both sides concurs, that when [*460] the bond was given, George Driggs was not a prisoner, but at large, and had been so for some days, by the permission of the sheriff. The other issue is upon the allegation, that the judgments were suffered by the plaintiff to be entered by default fraudulently. But there is no evidence of such fraud, and no ground from which to infer any. A judgment by default is no presumption of collusion, if no real defence appear, or could have been made. The verdict must, therefore, be set aside, unless we perceive *clearly* from the case, that the plaintiff can never sustain a suit upon the bond, and then a new trial would be useless. A bond given to indemnify against an escape *already happened*, is good.^(a) The bonds, which are void under the act, as being given for ease and favor, are those given by a person in custody. *Dawson v. Brumer*, cited in 10 Co. 100, a. Moore; 542, case 717; 11 Mod. 93, and 2 Ld. Raym. 1207. S. C. 6 Mod. 225. There is, therefore, no reason to conclude, from the testimony, as it appears in the case, that the bond is void; and it ought at least to appear

(a) The reason why a bond to permit an escape is void is, because it is to do an unlawful act. When that act is already done, the reason falls.

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manifestly, before the court could notice it under the present motion.[1]

The verdict must, therefore, be set aside on payment of costs.

LEWIS, Ch. J. and LIVINGSTON, J. absent.

New trial granted.

HITCHCOCK and FITCH *against* AICKEN:

A judgment in a sister state is only *prima facie* evidence of a debt, and the consideration, therefore, examinable in our courts.

THIS was an action of debt upon a judgment obtained in the supreme court held at Middlebury, in the state of Vermont; plea, *nil debet*. A verdict was taken for the plaintiffs for the sum of — dollars, subject to the opinion of the court on the following case:

The plaintiffs commenced their suit against the defendant, being a citizen of this state, in the county of Middlebury, *in the state of Vermont, by attachment.

They charged, in their declaration, that the defendant, on the tenth day of November, 1795, in consideration that the plaintiffs would buy of the defendant a horse for the sum of seven hundred and fifty dollars, promised the plaintiffs that the horse was sound, with an averment of the payment of the money by the plaintiffs, and that the horse was unsound. The defendant having been summoned, appeared by his attorney, and pleaded in abatement of the writ, that he was not an inhabitant of Pawlington, in the

[1] See *Acker v. Burrell*, 31 Wend. 605; *Trustees of Newburgh v. Galation*, 4 Cow. 340; *The Steuben Co. Bank v. Matthewson*, 5 Hill, 49; *Webster's Exrs. v. Blunt*, 19 Wend. 188, (note); *Stone v. Hooker*, 9 Cow. 154; *Kneeland v. Rogers*, 2 Hall, 519; *Strong v. Tompkins*, 8 J. R. 96; *Love v. Palmer*, 7 J. R. 159; *Harp v. Osgood*, 2 Hill, 216.

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county of Dutchess, in the state of New York, as described by the plaintiffs in their writ, but an inhabitant of Frederickstown, in the said county.

The plaintiffs demurred generally, and the court having considered the plea insufficient, the defendant afterwards pleaded *non assumpsit*; upon which a verdict was found for the plaintiffs, and judgment duly entered.

Upon the judgment, thus rendered by the court in Vermont, this action was brought, and it was submitted to the court to determine whether it was competent for the defendant to go into evidence as to the merits of the judgment obtained in Vermont; or, in other words, whether this judgment was to be considered as a foreign judgment and only *prima facie* evidence of the debt? if so, the verdict found in this court to be set aside, and a new trial granted; otherwise to stand.

THOMPSON J. The question now submitted to the court is, whether it was competent for the defendant, on the trial to go into evidence as to the merits of the judgment obtained in Vermont; or, in other words, whether this judgment is to be considered as a foreign judgment, and only *prima facie* evidence of the debt?

This case was submitted without argument, and the only point, I conceive, presented for consideration is, whether it was competent for the defendant, on the trial, to open the judgment, and go into an inquiry into the original merits of the action tried in the state of Vermont. I shall assume, in the examination of this question, as points conceded, and which I think, the case will fully authorize me to take for *granted, that there was a fair and [*462] impartial trial had between these parties in the state of Vermont, and that by the laws and usage of that state, the judgment would be conclusive between the parties there. If such was not the case, it was incumbent on the defendant either to disclose it by pleading, or set it up as a defence, under a general plea. Nothing is here set

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forth in any way impeaching the justice of this judgment, nor any allegation that it was irregularly or unduly obtained. If I am correct, then, as to the true question presented by the case, and the object of the defendant was to go into an examination of the cause on his part, as if it had never been before tried, I should say it was not competent for him to go into such an examination, but that the judgment was conclusive between the parties. As a general rule on this subject, I should consider judgments in neighboring states *prima facie* evidence of the demand, but liable to be opened and examined in the same manner only as they would be in the state where they were rendered. This I think a plain and simple rule, calculated to promote the ends of justice, and the one necessarily resulting from the political connection between the states; imposed by the constitution and law of the united government relating to this subject. To say that every action of slander, assault and battery, &c. or for a fraud, as was the case before us, and which had been fairly tried, and fully examined in a neighboring state, and judgment rendered, should be again opened, as if no trial had been had, would be manifestly unjust, and tending to oppression. To say that the judgment shall be conclusive between the parties would, in many instances, be giving it a more binding force than it has in the state where rendered; and to put it on the footing of foreign judgments altogether, would be considering that part of the constitution relative to the records and judicial proceedings of other states as a dead letter; and, besides, to say this judgment is to be considered in the light of a foreign judgment only, might perhaps, leave the question doubtful and unsettled how far it was examinable. In the case of *Walker v. Witter*, Doug. Rep. 4, it is decided that a foreign judgment is *prima facie* evidence of the debt, by which I understand the court to mean, that it is [*468] *not incumbent upon the *plaintiff*, in the first instance, to prove the ground, nature and extent of the demand on which the judgment had been obtained.

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Thus far, I think, judgments obtained in sister states ought to be considered analogous to foreign judgments; and in the case of *Sinclair v. Fraser*, Doug. 5, in note, decided in the House of Lords, on an appeal from the court of sessions in Scotland, the same principle was adopted as to a foreign judgment being *prima facie* evidence of the debt: but the court there said, that it was competent to the *defendant* to *impeach the justice of it, or to show it to have been irregularly or unduly obtained*. These would appear to be terms sufficiently broad to authorize the opening the judgment in every possible case; for it would be impossible to decide whether injustice had been done by the original judgment, without examining the whole merits of the action. Independent, however, of this consideration, I cannot view the judgment obtained in the state of Vermont in the light of a foreign judgment only, without disregarding the constitution of the United States, and the act of congress, as having no relation to the subject. The 4th article of the constitution declares, "That full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." This article, I think, manifestly presents two subjects for legislative provision; 1st. To prescribe the manner of proving such acts, records and proceedings; and 2dly. Their effect. In pursuance of this power we find congress, by an act passed 28th May, 1790, (Laws U. S. vol. 1, 159,) after prescribing the mode of proof, declaring, "That the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the state from whence the said records, are or shall be taken. The framers of this constitution, doubtless, well understood the light in which foreign judgments were viewed in courts of justice, and must have intended, by this article, to place the states upon a different footing with

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respect to each other than that on which they stood [*464] *in relation to foreign nations; had not this been their intention, they would have been silent on the subject. I am aware that the old confederation contained a similar article, (4th article,) declaring that "Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state." The construction to be given to this article, came, in some measure, under consideration in several of the state courts prior to the adoption of the constitution, but in no case, as far as my researches have extended, under circumstances analogous to the present; and, so far as the cases that I have examined look to the present question, I think we shall find principles recognized which are in perfect unison with those I have adopted. In the case of *James v. Allen*, 1 Dall. 188, decided in Pennsylvania, in the court of *common pleas*, in Philadelphia county, in the year 1786, the question directly before the court was, whether the defendant's *discharge from imprisonment*, by virtue of an insolvent act of the state of New Jersey, would entitle him to a like discharge in Pennsylvania, and the court determined not. But the decision was founded on the nature and terms of the New Jersey insolvent act, saying it was a private act, local in its nature and local in its terms, and went no farther than to discharge him from imprisonment in the *jail of Essex county, in the state of New Jersey*. And the case of *Phelps v. Holker*, 1 Dall. 261, decided in the supreme court of Pennsylvania, in the year 1788, was an action of debt, brought on a judgment obtained in Massachusetts, under their foreign attachment act, and the court decided that it was not *conclusive*, on the ground that it was a proceeding *in rem*, and ought not to be extended farther than the property attached, the act declaring that the judgment and execution in a foreign attachment shall only go against *the goods attached*. The case of *Kibbe v. Kibbe*, Kirby's Rep. 119, decided in the superior court of the state of Connecticut, in the year 1786, was an

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action of debt upon a judgment obtained in Massachusetts, and the court refused to sustain the action, on the ground that the defendant had not been personally served with process to appear in the original cause. The court saying, *full credence* ought to be *given to the judgments of the courts in any of the United States, where both parties are within the jurisdiction of such courts at the time of commencing the suit, and are duly served with the process, and have, or might have had, a fair trial of the cause. Thus, we see, in these cases that the court examined into the law of the state where the proceedings were had, in order to determine their operation and effect. But, as far as any decision in the circuit court of the United States ought to have weight in giving a construction to the constitution and act of congress, we have the question settled in the case of *Armstrong v. Carsons*, 2 Dall. 302, decided in Pennsylvania, in the year 1794. The question before the court was, whether *nil debet* was a good plea to an action of debt on a judgment obtained in the superior court of New Jersey; and *Wilson*, Justice, said *if the plea would be bad in the courts of New Jersey, it is bad here*; for whatever doubts there might be on the words of the constitution, the act of congress effectually removes them, declaring, in direct terms, that the record shall have the same *effect* in this court as in the court from which it was taken. The rule intended by the court to be prescribed here, clearly was the one which would have been adopted by the court in the state where the judgment was rendered. Although the act of congress does not adopt the term *effect*, as stated by the judge, yet, if it means any thing, it means to declare the effect. It says, "The said records and judicial proceedings, authenticated as aforesaid, shall have *such faith and credit* given to them, in every court within the United States, as they have, by law or usage, in the courts of the state from whence the said records are, or shall be taken." If the constitution, instead of saying the records &c. shall have *full faith and credit* given them, had adopted the pre-

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cise language of this act, it appears to me there would have been but little doubt but that it would have been considered equivalent to declaring such records to have the like *effect* in every court within the United States as in the courts of the state where rendered. It being a subject within the power of congress to declare the *effect*, I do not see why the act ought not to receive the same construction.

If nothing more was intended than to declare the [*466] manner of *authenticating such records and proceedings, this part of the act is useless; nay, worse it is mischievous, being calculated to mislead. I am the more inclined to think congress intended to declare the effect, because the rule there adopted appears to me to be the only one that could, with propriety, be prescribed, as there was no general and uniform practice in the different states on this subject. If a judgment in the state of Connecticut would not be conclusive there, but only *prima facie* evidence, it would be unreasonable to consider it conclusive here; and if conclusive there between the parties, I can see no substantial reason against considering it so here. When the matter has been once litigated, and the merits fairly tried, it appears to me to be contrary to sound principles, and tending to promote litigation, and against the very genius and spirit of the article of the constitution above referred to, again to open the judgment. I think the rule laid down by the court, in the case of *Kibbe v. Kibbe*, above cited, is founded in justice and good sense, that the judgments of courts, in sister states, ought to receive full credence where both parties were within the jurisdiction of the court at the time of commencing the suit, and were duly served with process, and had, or might have had, a fair trial of the cause. This I take to have been the situation of the case now before us; and, on this ground, I am of opinion, it was not competent for the defendant to go into evidence as to the merits of the original judgment.

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LIVINGSTON, J. This is an action of debt on a judgment of the supreme court of Vermont, and we are to determine "whether, after a full defence in that state, its justice is impeachable; or, in other words, whether it is to be regarded as a foreign judgment, and, as such, only *prima facie* evidence of a debt?"

As the court are not unanimous, it is matter of regret that a question so important is to be decided without argument. To me it appeared somewhat extraordinary, on the first hearing of this case, that it should be attempted to open the judgment of a sister state, when the party had been arrested, and made his defence. It struck me as conclusive; and that, on being satisfied of its existence, it was our duty to enforce it, without examining [*467] into the grounds of it, or into the conduct of the court or jury who decided it. These impressions, instead of being effaced, have acquired strength from posterior research.

By the common law of England, the consideration of foreign judgments need not be stated in the declaration, for they are received as evidence of debt liable to be impeached by the defendant, on the ground of injustice, or because of being irregularly or unduly obtained. When a person having obtained judgment in one court, applies to the tribunal of another state to put it in force, the interposition of the latter, it is said, is not *ex necessitate*, but only *ex comitate*, and, therefore, it may inquire into the original merits, to see whether there be a good ground for awarding execution; otherwise, it might sanction injustice. This reasoning is plausible, and has been adopted, among others, by Lord Kaimes, in his Principles of Equity, a work of which no professional gentleman should be ignorant. But, with proper deference, I must be allowed to observe, that this method of treating a foreign judgment renders it little better than a dead letter. If the whole merits are to be reviewed, the party may as well recur at once to his original cause of action, as to a record which the defendant is

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at liberty thus to impeach. Where he has appeared, and the matter has been fully litigated before a foreign tribunal, it would, perhaps, be a rule less liable to exception to admit it, without any examination, as conclusive of everything within it, between the immediate parties. The rule, however, in England, and the practice here, are otherwise; nor can I perceive, in any of the cases, a difference between the effect of a foreign judgment by default, and one where a defence had been interposed, although Lord Kaims appears to think a distinction exists. For, after stating a case in which a court in Scotland refused to carry into effect a judgment rendered by the king's bench, he observes that this decree was reversed by the house of lords, because, "in England, the decree of a foreign supreme court has such credence that judgment is immediately given, without entering into the merits, *provided the matter has been litigated.*"

Principles of Equity, 373. Finding no authority [*468] for this *distinction, sound as it is, I am not at liberty, if the judgment before us is to be regarded as a foreign one, to avail myself of it in deciding this cause, and to say, here the matter was litigated, and, therefore, the judgment is conclusive.

It becomes necessary then, to inquire whether, by the constitution of the United States, any difference be created in this particular between judgments rendered *out of* and within the United States. The former, for the sake of distinction, we will call foreign, the latter, domestic judgments, although this appellation in common parlance, be confined to judgments of our own courts.

We cannot suppose that those who penned the constitution were ignorant that a judgment, when the ground of action in its native state, (if the expression be allowed,) could not be contested, while other judgments were subjected to the strictest scrutiny. In the latter description were included as well judgments recovered *extra territorium*, as within any one of the United States, which at common law, were all on the same footing. To introduce a distinc-

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tion between domestic and foreign judgments, and to place the former on the most favored footing, must have been their intention; otherwise, they would have been silent, or used terms *declaratory* only of the common law, so as to render them evidence of debt, but not conclusively so. It remains to be ascertained whether this intention has been well expressed, or whether the terms used, are so ambiguous or unintelligible as to render this article of the constitution senseless and nugatory, which must be the case, if the justice of this judgment can be examined by us.

When the object of an instrument admits of no doubt, we should not hastily reject the expressions as not adequate, or incompetent. Without too much constraining their meaning, it is our duty, if they will bear the sense which they were intended to convey, to understand them accordingly. The first section of the fourth article declares, "That full *faith and credit* shall be given in each state to the public acts, records, and judicial proceedings of every other state. A congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and *the effect thereof*." It is difficult to *make choice of language more apt to render a [*469] domestic judgment as binding here, as if it had been obtained in one of our own courts. What other signification, so natural or obvious, can be affixed to the terms, "*full faith and credit*," as that, when the existence of these judgments is once established, (to ascertain, which required no constitutional provision,) they *shall* be received as containing the whole truth and right between the parties, and that the matters, or points settled by them shall not be drawn into dispute elsewhere. If open to litigation, there is an end of all faith and credit whatever, and the pretensions of the parties are investigated as if they had not already been discussed, and properly adjusted. Now, to give full faith and credit to a record, cannot consist with not believing it ourselves, or permitting others to make averments against it. If the constitution imposes on us the

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first of these duties, we disregard the injunction the moment we allow others, or permit ourselves, to discredit or impeach a domestic judgment. I am at a loss to conceive how the true import of this article could ever become a subject of debate, or receive a construction destroying it altogether, and with it one cement of union between these states. When we give credence to an instrument we do not barely believe in its being, or existence, but assent to its contents; so if credit be given to an ambassador, by the court to which he is sent, the latter do not thereby only admit that he is invested with that character, but that what he says is true. It is the same when a witness is credited; it is his relation which is believed; not merely that he appears as a witness. In like manner if full faith and credit be given to a deposition, it does not only imply that we admit there is such a writing, but that we fully and implicitly rely on its contents. Why should a different meaning be adopted when similar terms are applied to a judgment. If we take them in the same sense, and, in my estimation, they admit of no other, then, by giving full faith and credit to a judgment, we not only agree that such judgment has been rendered, (which depends altogether on the proof of that fact,) but that we believe it to be just, and that the matter in dispute was properly decided. If it be otherwise, so long as we obey a constitutional [*470] *injunction, we cannot do wrong in regarding it in a light which the terms of the instrument import, and which appears to have been the design of those who composed it.

At the time of our confederation, (for a like article is found in that first band of union,) it was natural, after it had been agreed, that the "free inhabitants of each state should be entitled to all the immunities of free citizens in the other states," to engraft a provision on this subject, and, considering the general conformity between the laws and judicial proceedings of the different states, it would not have comported with courtesy, mutual confidence, or good

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sense, to pay no more respect to domestic adjudications than to those of foreign nations, of whose laws we were ignorant, and whose modes of proceeding did not accord with those with which we had been familiar, and which we had been accustomed to regard as the best for the attainment of justice. Little doubt, therefore, can remain as to the intention of those who consented to this article of the constitution.

But if the language of this article be of doubtful signification, some have supposed every ambiguity removed by the act of congress which passed the 26th May, 1790. (Laws U. S. vol. 1, p. 115, Folwell's edition.) After prescribing the mode in which the records and judicial proceedings of one state shall be authenticated, so as to be admitted as proved by the court of another, this act provides, "That the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are taken."

This law was passed in virtue of powers given to congress by the 4th article of the constitution; and if they really possessed the right of declaring the effect of domestic judgments, and these words apply to that object, they are intelligible and effectual. If understood in that light, we are compelled to esteem a judgment rendered in Vermont, when properly authenticated, as binding and final as it would be regarded by the court from which the exemplification comes; and as there is no proof of its not being conclusive **there*, we must presume it [*471] to be so, and, of course, it must be equally so *here*. But my opinion is drawn from the constitution, and is altogether independent of this act; for it is not clear that congress had any thing to do with the effect of domestic judgments. It is extraordinary, to say the least, that after the constitution had declared that "full faith and credit" were to be given them, it should be left

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with congress to vary their operation, if they thought proper. The effect could as easily be settled by the constitution, as referred to congress. I am, therefore, inclined to think, that the "*effect*," spoken of in the 4th article, refers to the proof to be prescribed by congress, that being its immediate antecedent. They were first to say how these judgments were to be proved, and then declare the effect of such proof, and, perhaps, this is the true intent of the act, which substantially says, that such proof (after prescribing its nature) shall be as good evidence *abroad*, of the existence of the judgment, as the record itself is *at home*. Instead, then, of expecting congress to settle the effect of domestic judgments, we must not look further than the constitution itself, which will be found sufficiently explicit. I am not apprized that a serious difficulty has ever been entertained, by the courts of the United States, respecting the true meaning of this article. In the circuit court of the United States, for the district of Pennsylvania, when Judge *Wilson* presided, the point we are now discussing was considered as a clear one.

An action of debt had been brought on a judgment rendered in New Jersey, in which the plea was *nil debet*. 2 Dall. 302. The plaintiffs insisted that this plea was inadmissible, and that "*nul tiel record*" being the only plea which the courts of New Jersey would sustain if the action had been brought there, (by which the existence of the judgment is denied,) was the only proper plea in Pennsylvania.

It is stated in the report, that Ingersoll, who was concerned for the defendant, declined arguing the point, thinking it clearly against him.

Wilson, in delivering the opinion of the court, says, "There can be no difficulty in this case. If the plea would be bad in the courts of New Jersey, it is bad here; [*472] for, *whatever doubts there might be on the words of the constitution, the act of congress effectually removes them, declaring, in direct terms, that the record shall have the *same effect* in this court as in the court

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from which it was taken. In the courts of New Jersey no such plea would be sustained, and *therefore*, it is inadmissible in any court sitting in Pennsylvania."

This decision of a court of the United States, although not of the last resort, is entitled to a respectful consideration.

I am aware that, in some instances, mischief may result from making this rule universal, or from too rigid an adherence to it; particularly when the proceedings are by foreign attachment, or without a personal summons or arrest of the defendant. Sitting here "*jus dicere et non jus dare*," it would be a sufficient answer to all complaints of this kind to say, "*ita lex scripta est*;" or perhaps, we possess the power, and I think we do, in extraordinary cases, and where it is manifest the proceedings have been *ex parte*, of considering them as exceptions to the general law, and as not contemplated by the constitution. This would be a better course than to render null and void one of its most important and salutary provisions. A case of this kind occurred in Pennsylvania, (1 Dall. 254,) where an action was brought on a judgment in Massachusetts, obtained in a foreign attachment, whereon the sheriff had seized a blanket as the defendant's reputed property. The supreme court of that state determined, not that domestic judgments were not conclusive evidence of debt, generally speaking, but, that this being a proceeding *in rem*, was not to be extended farther than the property attached, for by the very words of the Massachusetts' law, which was read, it appeared that judgment and execution, in a foreign attachment, were confined to the goods attached. This case happened under the confederation, "whose articles," says the chief justice, "must not be construed to work evident mischief and injustice." This decision, in which there is much good sense, instead of derogating from, harmonizes with, my construction of the constitution. Let a law be ever so plain, cases must and will happen which were *not foreseen, or would have been provided for; [*473] and courts must then determine, according to the

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reason and spirit of the provisions, whether they include the particular subject before them. These are the cases, which "*lex non exacte definit, sed arbitrio boni viri permittit*." Now no violence is done to my understanding of this article in saying, that it does not embrace a judgment which has been rendered against a party to whom no opportunity was afforded of controverting his adversary's demand, and who, instead of being defended by himself or by counsel of his own choice, had no other representative than an old blanket, or a log of wood. A sentence thus obtained, in defiance of the maxim "*audi alteram partem*," deserves not the name of a judgment: it is rather a silent and necessary act of the court, not proceeding from an exercise of discretion and reflection, or founded on a consideration of the respective rights of the parties, but the consequence of certain rules which allow a judgment in some cases to be entered, whether the defendant has been served with process or not. If, in the case which arose in Pennsylvania, the plaintiff, instead of proceeding against a blanket, had arrested the defendant, who had thereupon interposed a plea, it can hardly be doubted that the court would have held the judgment conclusive: on the ground of reason alone, it ought to prevail, as a general rule, that a judgment like this should be binding and final throughout the United States. The fear of committing injustice, by blindly enforcing it, has too much of refinement in it. It is not so much because a court abroad has done right, that we lend our aid to carry its decrees into effect, as because it was competent to decide the question, and the parties were heard before it. Wantonly to open such judgments, from an apprehension of doing iniquity, will be attended with great hardship and inconvenience to the successful party. At an immense expense, and after great labor and delay, he has had a trial with us, and succeeded; the most eminent counsel have been employed; witnesses, from different parts of the world, have either attended in person, or been examined on commission, and a jury of twelve men have

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pronounced in his favor, and their verdict has been confirmed by *the court: but, before execution, [*474] the defendant escapes to another state, where he is sued on this judgment. It is alleged there that the merits have not been fairly tried, and the judges, giving way to certain qualms, lest they may commit a wrong in carrying our judgment into effect, try the cause again. By this time, perhaps, the plaintiff's witnesses are dead, or not to be found: at any rate, the additional costs, pains, and delay are intolerable. Thus the inconveniences of opening domestic judgments, on the suggestion of the party who pretends to be aggrieved, will far outweigh those which may be the consequence of a contrary rule, to which it will be easy to make exceptions as fit cases occur.

As, then, this is a judgment neither *in rem*, which, like sentences in the admiralty, bind *only* the property and secure the vendee; nor by default, where the defendant was not summoned; but is against the person, and after a full defence and hearing, the constitution of the United States, and the reasonableness of the thing, constrain me to regard it as conclusive of every matter determined by it, between the parties to the record. I cannot, therefore, listen to any allegation to the contrary, nor consent to another trial, the avowed object of which is, to impeach its verity and justice, and to bring on before us a new discussion of the original merits.

RADCLIFF, J. The question submitted to our decision is, whether the judgment in Vermont is to be considered in the light of foreign judgments, and evidence *prima facie* only of the plaintiff's demand, or shall conclude the defendant. If it is to be viewed in the light of foreign judgments only, then a new trial is to be awarded in the present action, otherwise judgment is to be rendered for the plaintiffs.

This question arises on the first section of the 4th article of the constitution of the United States, and the act of con

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gress made in pursuance of it, and may seriously affect the administration of justice in every state. It is, therefore, peculiarly interesting, that it should receive a correct and uniform decision. It has, on former occasions, incidentally occurred in this court, and opinions have been intimated; but it has not received a direct determination.

[*475] From the best consideration I am *able to give it, I am led to the conclusion, that the judgments of the courts of other states in the union are to be viewed in the light of foreign judgments only.

Independent of the constitution of the United States, and the act of congress alluded to, it is clear that the judgments or decrees of the courts of a neighboring state, when made the ground of an original suit here, would be considered as foreign judgments, and, as such, by the English law and our own, would be received as *prima facie* evidence of the justice of the plaintiff's demand, but liable to be examined and impeached by the defendant. This would follow from the single consideration that the jurisdiction of each state, with respect to its internal administration of justice, is distinct and independent of every other. It remains therefore, to be seen whether the constitution and act of congress have created a different rule.

In the examination of this subject, it may be proper to notice that the former confederation contained similar provision. By the confederation it was declared, that "*full faith and credit* should be given in these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state." At an early period, doubts appear to have arisen as to the import of the terms *full faith and credit*. In the case of *Phelps v. Holker*, reported in 1 Dall, the supreme court of Pennsylvania decided, that this article of the confederation should not be so construed as to make a judgment, obtained on a foreign attachment in Massachusetts, conclusive in Pennsylvania.

The constitution of the United States, it seems, intended to remove these doubts, and plainly distinguishes between

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the *faith and credit* which shall be due to such records, acts, and judicial proceedings, and their *legal effect or operation*. It first declares, nearly in the terms of the confederation, that "*full faith and credit* shall be given to the public acts, records, and judicial proceedings of any other state," and then distinctly provides, that "congress may, by general laws, prescribe the manner in which such acts, records, and judicial proceedings shall be proved, and the *effect thereof*." The full faith and credit, intended by the constitution, *cannot be interpreted to mean their legal [*476] effect, for otherwise, the subsequent provision that congress may prescribe the *effect* would be senseless and nugatory. The constitution makes a plain distinction between *credit* and *effect*; and that distinction, I think, is consistent with that principle of the common law, which ascribes absolute verity to the records and judicial proceedings in our own courts. When a judgment, or recovery in our own courts, is pleaded, it is alleged as a fact, the record of which cannot be denied, and is conclusive of the fact, and it is, accordingly, the subject of a peculiar mode of trial: but its legal effect, or operation on the rights of the parties, is still to be considered, and frequently may form a distinct question. The provision in the constitution, relative to the judicial proceedings of the courts of the different states, can extend no farther.

Congress have the power to prescribe the mode of proof, and the effect. By their act of the 26th May, 1790, they have prescribed the mode of proof, but they have not declared the effect, unless the following words of the act be considered in that light: "And the said records and judicial proceedings, authenticated as aforesaid, shall have *such faith and credit* given to them, in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are, or shall be taken."

At first view, the framers of this act seem to have intended a regulation beyond the provision contained in the

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constitution; but if this was their intent, I think they have not accomplished their end. The constitution itself declares that *full* faith and credit shall be given to such proceedings. This imports *absolute verity*. It cannot be increased in degree, and congress had not the power to diminish the credit. When therefore, the act declares that *such* faith and credit shall be given to them as they have by law or usage in the courts of the state from whence they are taken, it can mean no other than full faith and credit. From the nature of the thing, it can mean no more, and without impeaching the absolute verity ascribed to them by the constitution, it cannot mean less. It, therefore, leaves the credit and the question, as to the legal effect and operation, [*477] precisely where they were, and the power to prescribe the effect remains unexecuted.

It is easy to perceive, that serious difficulties would occur in attempting to carry this power into execution, and these difficulties have probably, embarrassed, and deterred congress from exercising it. In their act, we find the same terms, "*faith and credit*," which are used in the constitution, and those only. The constitution, however, makes the distinction, as has been shown, between credit and effect. With this distinction, plainly drawn, I cannot suppose that congress meant to confound it by treating the terms faith and credit, as synonymous with effect. On the contrary, they must be considered as conveying the same sense, both in the constitution and the act; and, of course, that congress have not executed the power of declaring the effect. Until that be done, the legal operation of such judgments must be the same as it was before there existed any legislative provision on the subject. Nothing more than the mode of authentication was, therefore, provided for by the act of congress. When so authenticated, they are entitled to full faith and credit; but they are to be received as *evidence* merely, by which their contents are undeniably established, and their effect, or operation, not being declared, remains as at the common law.

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I am sensible, that the case of *Armstrong v. Carsons*, 2 Dall. 302, stands in opposition to this doctrine. That was an action of debt in the circuit court of the United States, for the district of Pennsylvania, brought on a judgment obtained in New Jersey, in which the counsel for the defendant yielded the position that the judgment was conclusive; and the court, without a previous discussion, adopted the idea, on the supposition that the act of congress had declared the effect to be conclusive. The presiding judge, in delivering the opinion of the court, states the act as having *expressly declared the effect*. In terms, he was evidently inaccurate, and whatever respect may be due to the decisions of that court, its opinion, in this instance, does not appear to me to be correct, nor to have been founded on a deliberate examination of the subject.

Upon the construction of this article *of the [*478] constitution, and the act of congress, I am, therefore, of opinion, that the judgments of other states are to be considered in the light of foreign judgments, and, when made the foundation of a suit in our own courts, are not conclusive, but from courtesy, are to be admitted as presumptive evidence only of a title to recover, according to our own laws. To allow them a greater effect might be attended with much inconvenience, and produce an irregular interference of jurisdiction between different states, and, in some cases, enable them to prescribe the law to each other. The consequences cannot easily be foreseen, and might often lead to injustice and individual oppression.

I am of opinion that the verdict be set aside, and a new trial be awarded.

KENT, J. The important question arising in this case is, what is to be the effect in this court, of the judgment in Vermont, according to the constitution and laws of the United States?

The constitution declares that a full faith and credit shall

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be given in each state, to the public acts, records, and judicial proceedings of every other state, and that congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

This injunction, that they were to receive *full faith and credit* in every state, made a part also of the articles of confederation; but, under those articles, it seems to have been understood that the question on the *effect* of such records and judicial proceedings was still left open. In the case of *James v. Allen*, 1 Dall. 188, in the court of common pleas at Philadelphia, in the year 1786, a question arose on the effect of a discharge under the insolvent law of New Jersey and the construction of this article in the confederation was brought into discussion, and it was contended that a judgment, or other judicial proceedings of another state, was, by this article, rendered unexaminable, and conclusive evidence.

But the court said, that the article would not admit of that construction, and that it was chiefly intended to oblige each state to receive the records of another, as full [*479] evidence *of such acts and judicial proceedings.

Again, in the case of *Phelps v. Holker*, 1 Dall. 261, in the supreme court of Pennsylvania, in April term, 1788, an action of debt was brought upon a judgment in Massachusetts; which judgment was obtained against the defendant by default, and founded on an attachment of a blanket, which was shown to the sheriff as the reputed property of the defendant, and the question was, whether the judgment was conclusive evidence of the debt. It was contended, on one side, that the judgment was, by the articles of confederation, rendered conclusive, and that it made no difference in the case that the judgment was obtained by the process of a foreign attachment. The other side insisted that the articles of confederation provide only that, *in matters of evidence*, mutual faith and credit should be given, and especially that they ought not to be conclusive when

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founded on foreign attachment. The court decided, that the defendant was still at liberty to controvert and deny the debt, and that the articles of confederation must not be construed to work such evident injustice as was contained in the doctrine urged by the plaintiff. Another case I shall mention was that of *Kibbe v. Kibbe*, Kirby, 119, decided in the superior court of Connecticut, in the year 1786. It was an action of debt on a judgment obtained in Massachusetts by default, and founded on the attachment of a handkerchief, and so, like the preceding case, a proceeding *in rem*. The question came before the court on demurrer, and judgment was given for the defendant, on the ground that the court in Massachusetts had no jurisdiction of the cause; but the court admitted that full credence ought to be given to judgments in other states, where both parties were within the jurisdiction of the court, and the defendant duly served with process, and had, or might have had, a fair trial of the cause.

It appears from these decisions, that judgments in other states were not regarded under the confederation as of binding and conclusive effect; and the defendant was admitted to deny the regularity and equity of the proceedings by which the judgment was obtained. This was placing the judgments of the other states on the basis of foreign judgments, which are received only as *prima facie* evidence of the debt; and it lies with the defendant to impeach the justice thereof, or to show them to have been irregularly or unduly granted. *Sinclair v. Fraser*, cited in Doug. 5, note, and in Appendix, p. 6, 7, in the case of *Galbraith and Neville*.

Such being the received construction of the injunction, that full faith and credit was to be given to the judicial proceedings of other states, it remains to see whether the case is altered under the existing constitution of the United States. That constitution, by authorizing congress to prescribe not only the manner in which the acts, records and proceedings of other states shall be proved, but their effect

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evidently distinguished between giving *full faith and credit*, and the giving effect to the records of another state, and until congress shall have declared by law what that effect shall be, the records of different states are left precisely in the situation they were in under the articles of confederation.

The act of congress of 28th May, 1790, is entitled "An act to prescribe the mode in which the public acts, records, and judicial proceedings in each state shall be authenticated, so as to take effect in every other state." After prescribing the mode of authentication, it declares that the records and judicial proceedings so authenticated, shall have *such faith and credit* given to them in every court within the United States, as they have by law or usage in the courts of the state from whence they are taken. This act leaves the question as to the *effect* of such records precisely where it found it. The articles of confederation, in the first instance and the constitution, in the second, had already declared that such records and proceedings were to receive *full faith and credit*; and this act, without prescribing the effect, defines, or, rather, qualifies, the faith and credit they are to receive. Instead of *full faith and credit*, they are to receive *such faith and credit*. We are bound to give the judgment faith and credit, and this faith and credit was considered by the state courts, while sitting under the government of the articles of confederation, as requiring full assent to the proceedings contained in the record, as matters of evidence and fact, but not as absolutely barring the door against any examination of the regularity of the proceedings, and the justice of the judgment.

[*481] *I ought here to notice the case of *Armstrong v.*

Executors of Carson, 2 Dall. 302, as leaning against the conclusions I have drawn. It was an action of debt brought in the circuit court of the United States for Pennsylvania district, on a judgment obtained in the state of New Jersey.

The question was, whether the plea of *nil debet* was good, and the court was of opinion, the plea being bad in New

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Jersey, was bad there also; for whatever *doubts* there might be on the words of the *constitution*, the act of congress effectually removed them, by declaring, in direct terms, that the record should have the *same effect* in that court as in the court from which it was taken. But the reason given for this opinion, if the report of the case be correct, is clearly founded in mistake.

The act of congress does not declare the record shall have the *same effect*, but only the *same faith and credit*, and there is a manifest and essential difference between the one mode of expression and the other. If, therefore, as the court intimated, there were doubts on the words of the constitution, those doubts, so far from being removed, are rather increased by the law. The language of the constitution is, at least, as cogent and comprehensive, if not more so, than the language of the law.

It is pretty evident that the constitution meant nothing more by full faith and credit, than what respected the evidence of such proceedings; for the words are applied to public acts, as well as to judicial matters; nor ought the act of congress to be carried further than the words will warrant. When we reflect in what manner judgments may, in some instances, be obtained, as in the cases cited, by the attachment of a handkerchief or blanket, it is more favorable to the harmony of the union, and to public justice, that the judgments of the several states should be put on the footing of foreign judgments, than that they should be held absolutely binding and conclusive, or as much so as they may be by the laws of the state which authorized the proceeding; and if we may question the binding force of the proceeding or judgment in one case, we may in another; for, the acts of congress has no exceptions, and must receive a uniform *construction. [*482] If a debtor be discharged from imprisonment, or from his debts, by the insolvent act of some other state; or if their courts be authorized to grant a stay of suits for a time, are we bound by these acts; for they all are, or may

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be, judicial proceedings. There are no considerations of national policy that could induce us to suppose the act of congress went the whole length of closing the investigation of the judgment. It would be going further than ever was done in any civilized country, even with respect to its own dominions. Between England and Scotland, England and Wales, (*Walker v. Witter*, Doug. 1; *Sinclair v. Fraser*, cited in the notes, and *Galbraith v. Neville*, 29 Geo. III. cited in the Appendix, p. 5,) or England and its colonial establishments the union is as intimate and as interesting as between the several states; and yet the judgments in Scotland, (Kaims' Equity, vol. 2, 365, 377,) or Wales, or Jamaica, for instance, are held to be foreign judgments. So the court of sessions, in Scotland, consider judgments rendered in England as foreign judgments; that they have no intrinsic authority *extra territorium*; and that in actions upon them, they are to be presumed just till the contrary be proved; and if they are shown to be unjust, or irregular, the suit upon them will not be sustained.

The judgments of other states have been treated in this court in the light of foreign judgments, by admitting the plea of *nil debet* (a) to be the proper plea, instead of the plea of *nul tiel record*. The court had intimated doubts on the question in prior cases; (*Le Conte v. Pendleton*, April term 1799, and *Cobbet ads. Rush*, January term, 1801;) but in the case of *Post and another v. Nerby*, in January term last, they decided that *nul tiel record* was a bad plea; and it follows, pretty conclusively, that if a judgment of another state is not to be treated in the pleadings as a record, it cannot have the same obligatory force. So in the case of *Phelps v. Bryant*, Administrator, decided at the last term, we refused to sustain an action on a decree of the superior court of Connecticut, founded on the service of a summons within this state. An act of the legislature had rendered all

(a) In Massachusetts it has been decided, on demurrer, a bad plea to a judgment in a sister state. *Noble v. Gold*, Berkshire county, 1 Mass. Will. Rep. 410, n.

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judgments and decrees, founded on such service, void, as far as respected our own government. But if the decree in that case was of conclusive effect under the constitution and laws of the union, the plea to the merits of that decree, as resulting from the irregular commencement of the suit, would have been bad notwithstanding our statute.

*The result of my opinion is, that the judgment in [*483] question is to be considered in the light of a foreign judgment, and only *prima facie* evidence of the demand.(a)

(a) The same principle has been recognized in Massachusetts, and that the act of congress does not declare the effect of judgments in sister states. *Bartlett v. Knight*, 1 Mass. Rep. 401. The consequence necessarily is, that they can be considered only as simple contract debts; *Hubbell v. Cowdry*, 5 Johns. Rep. 132, so far, however, established, that matters proper for jury determination, which appear from the record to have been fairly submitted to them, cannot be overhauled; and, indeed, in order to rebut the *prima facie* evidence they carry with them, the defendant must show their injustice, or, from positive proof, that they have been unfairly or irregularly obtained. *Taylor v. Bryden*, 8 Johns. Rep. 173. Therefore, if it appear that the judgment proceeded upon, was obtained against an absentee from the state, without any personal summons or notice, as by nailing a declaration against a court-house door, *Buchanan v. Rucker*, 9 East, 192, or attaching goods, *Kilburn v. Woodworth*, 5 Johns. Rep. 37, or on a rule, served on the defendant out of the jurisdiction, to show cause why judgment should not go against him, *de bonis propriis*, *Fenton v. Garlick*, 8 Johns. Rep. 184, an action cannot be maintained upon it. The only reason why it will support a suit, is the implied *assumpsit* to pay, which, in the cases above put, the law will not raise. The same rule governs in suits against bail as in those against their principals. *Robinson v. Ex'rs. of Ward*, 8 Johns. Rep. 364. But though the foreign judgment be by *nū dicit*, as the record is "comes and defends the wrong," &c., that fact will be presumed to be true, and that the party had notice and appeared. *Malony v. Gibbons*, 2 Camp. 502. It would seem that in Connecticut a judgment obtained in another state, after actual or legal notice, cannot be impeached. *Smith v. Rhoades*, 1 Day's Cas. in Error, 168

See also *Pauling v. Bird's Ex'rs.*, 13 J. R. 205. But it is now established, that a judgment of a sister state is conclusive and incontrovertible, if the court had jurisdiction not only of the cause, but of the parties also, by the personal service of process, or the appearance of the defendant. See *Mills v. Duryee*, 7 Cranch, 481; *Borden v. Fitch*, 15 J. R. 121; *Bissell v. Briggs*, 9 Mass. Rep. 462; *Shumway v. Stillman*, 6 Wend. 447; *Andrews v. Montgomery*, 19 J. R. 162; *Starback v. Murray*, 5 Wend. 148; *Wheeler v. Raymond*, 8 Cow. 311; *Thomas v. Robinson*, 3 Wend. 267; *Bradshaw v. Heath*, 13 Wend. 407.

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Receptum est optima ratione in executione sententiae alibi late, servari jus loci in quo fit executio, non ubi res judicata est.
2 Huber. 540.

LEWIS, Ch. J. The question between these parties is both important and difficult; and my opinion upon it has been formed with diffidence and deliberation. Were the whole case, or both parties, before us for consideration, it would be easy to determine on their respective merits. But we are called to decide an abstract proposition; whether under the article of the constitution, and the act of the general government, referred to, the judgments of courts of another state shall be so conclusive here as to exclude all further examination of their merits? Had this article gone no further than that of the confederation on the same subject, I should have doubted the correctness of the principles of decision in *Phelps against Holker*, as applicable to it; and should have understood *full faith and credit* in the same sense that *implicit faith* is applied in Westminster Hall to the records of a court of record; which is, that they are not to be controverted. But the latter part of this section precludes such understanding, and qualifies the sense in which the former is to be accepted. For, where is the use of congress prescribing, by general laws, the effect of such judgments, or of the proof of them, which is the same thing, (should that be the grammatical construction,) if by *full faith and credit* absolute verity is intended.

The next question is, does the act of congress prescribe the effect of such judgments? In terms it certainly does not. On the contrary, it limits and restrains the generality of the first period of the article under consideration, by declaring that such judgments, when authenticated in the manner prescribed, shall be entitled to *the same faith and credit in every court within the United States, as they have by law or usage in the courts of the state from whence they are, or shall be taken.* But admitting the act of congress to be an execution of the power vested in that body by the

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constitution, it will not, in my *conception, have [*484] the effect of rendering such judgments conclusive here. It will become necessary to examine their effect in the state in which they are pronounced, and we know that some of them, which are founded on attachments issuing in neighboring states, against absent debtors, are not conclusive in those states. And it certainly never could be intended to give such judgments greater effect here than they would have there. We have had instances also, of process issuing from a court of a neighboring state being served here, in violation of a positive law of our own state, which we are bound, by such law, to consider as illegal and void.

By pronouncing them conclusive, we should also preclude all inquiry into fraud, which certainly would vitiate them in every state possessing a regularly organized system of jurisprudence.

I cannot, therefore, believe, that a just construction of the constitution and law of the United States will warrant the conclusion, that such judgments are in no case re-examinable in an action founded on them in another state; and, therefore, as we are called upon to pronounce on this question in the abstract, my opinion is, that the verdict be set aside.

New trial.

JACKSON, *ex dem.* PRIOR, A. KNAP and E. KNAP,
against BROWN.

Though the act of God be the cause of not proceeding to trial according to notice, yet, if the impossibility of proceeding be discovered in time for a countermand, which the plaintiff neglects to give, he must pay costs.

This was an application for costs for not proceeding to trial.

Kirby v. Cogswell.

The plaintiff relied on the prevalence of the yellow fever, which after noticing for the circuit, prevented him from obtaining a paper necessary on the trial.

Per Curiam. It does not appear any countermand was ever given, though there was time for doing so, between the period when the impossibility of procuring the document was discovered, and the day fixed for the circuit. It is true, the act of God is to work injury to no one; but when, as here, the impossibility induced by that act could have been communicated to the defendant in season, to to have prevented his attendance on the circuit, and this was omitted, the fault was with the plaintiff, and he must pay costs.(a)

Motion granted.

KIRBY *against* COGSWELL.

After certificate to stay proceedings, both parties may notice for argument.

It was ruled in this cause, that, after a certificate [*485] of probable *cause, to stay proceedings, both parties may notice for argument, and that the not entering and noticing for argument by the party obtaining the certificate to stay, is no cause for a motion to discharge the order; Vide ante, 343, especially if made without notice

(a) See *Jackson v. Mann*, ante, 123

People v. Freer.

THE PEOPLE *against* FREER.

On a rule to show cause why an attachment should not go for a contempt in publishing things reflecting on the court, in a cause then pending, the defendant should appear in person on the day for showing cause. Denying any disrespectful intent is only an excuse, but no justification, if the words published be, in the opinion of the court, contemptuous.

A RULE was granted last term, for the defendant to show cause, on the first day of this, why an attachment should not issue against him for a contempt in publishing some paragraphs in the Ulster Gazette, respecting the trial of Harry Crosswell, for a libel on the president, then *sub judice*.

Hamilton, on bringing in the affidavit of the defendant, (who did not himself appear in court,) moved for an enlargement of the rule till the next term, to consult with the defendant as to expunging some part of the matters introduced, as irrelevant. The idea of an intentional contempt was, he said, denied, but there were circumstances introduced, which counsel thought had better be omitted.

Per Curiam. If the application had been to supply any new fact, and that fact had been made to appear by affidavit, it would have been attended to; but we cannot enlarge a rule merely to give counsel an opportunity to consider of the propriety of expunging parts of an affidavit, which, we must consider, has been made according to the truth of the case.

Hamilton then read the affidavit, which did not deny the publication, but only went to negative any intentional contempt or disrespect towards either the court or its members.

Sanford, contra. The publication being confessed, the

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court has only to pronounce whether it amounts to a contempt or not. The intention, giving it the utmost latitude, can be taken only in mitigation. It cannot make the publication less a contempt. A man cannot justify his conduct by saying I have offended, but did not mean to sin. The question is simply this, ought an attachment to go [*486] for this *publication? In deciding this question the court is not to look beyond the words contained in the paper.

Hamilton, in reply. I cannot subscribe to the doctrine that the court will not look beyond the paper itself. This is extending the doctrine of libels. I have heard, that there the truth may not be given in evidence, but never yet did I hear that another paper, or circumstance, may not be given in evidence to show the intent. So here, the motive of publication may surely be urged to prove that no contempt, in fact, existed.

Per Curiam. The affidavit does not justify the publication. It is at best but an excuse. On such occasions as the present, the defendant ought to appear in person and answer. Let, therefore, the rule for an attachment be made absolute.

Rule for attachment absolute.

HOUGHTON *against* STRONG.

The declaration in a justice's court should be so far formal as to show the cause of action, or it will be fatal on error

On *certiorari* from a justice's court. The declaration, as appeared from the return, stated, that the defendant "privily, wilfully and maliciously, *by certain conduct*, damaged the plaintiff to the amount of twenty-five dollars."

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General errors were assigned; and it was principally relied on, that no cause of action was stated in the count so as to show the justice had cognizance of the suit.

Per Curiam. The declaration is bad. It ought to have stated not only the injury, but how it arose. If this be necessary in this court, it is more so before inferior tribunals, whose proceedings may be reviewed here. Unless the cause of action be stated with certainty, it is impossible for us to know whether the justice had jurisdiction or not. This very suit may, for aught that appears, have been slander, or for an assault and battery, or for some other matter not cognizable before a justice. Nor does it appear by any part of the record, (none of the testimony being returned,) what kind of action was proved by the witnesses. The judgment must, therefore, be reversed with costs.(a)

Judgment reversed.

(a) The general rule as to pleadings in a justice's court is, that they need not be framed with technical nicety; *Ehel v. Smith*, 3 Caines' Rep. 188. *Picket v. Weaver*, 5 Johns. Rep. 122, the court having expressly said that special pleading before those tribunals is to be discountenanced. *Kline v. Husted*, 3 Caines' Rep. 275. The declaration, however, should state, though in general, a cause of action, as "for damages on account of not fulfilling a contract for a lot of land;" *Petrie v. Woodworth*, 3 Caines' Rep. 219, because such *non-feasance* shows a cause of action. But if the demand on the face of the declaration be illegal, the court will not sustain the proceedings. As on a declaration for tavern expenses above one dollar and 25 cents, without showing that the defendant was a traveller, or lodger in the plaintiff's house, *Ehel v. Smith*, *ubi sup.*, so under the act "to lay a duty on strong liquors," the declaration is bad without a time or place where the liquor was sold, *Blasdel v. Hewitt*, 3 Caines' Rep. 137, *aliter*, when it states that the defendant "did, in the house of A. in the said town, sell to B. and received pay for one half pint of whiskey." *Picket v. Weaver*, *ubi sup.* Where the declaration, on a promise to pay the debt of another, does not set it forth to be in writing, it will be presumed, if not shown to the contrary. *Holly v. Rathbone*, 8 Johns. Rep. 148.

Notwithstanding the disapprobation with which the case of *B'ariell v. Hewitt*, has, more than once, been mentioned, it is hazarded as an authority and is believed to be a sound one. The error laid down by Kent, Ch. J., as fatal, is fully recognized by the court in *Picket v. Weaver*. The declaration did not state the town where the offence was committed, and, says the

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KNAPP *against* PALMER.

Certiorari amended according to the affidavit on which obtained by striking out the words "trespass on the case," and inserting "debt."

ERROR on *certiorari*. The affidavit on which the *certiorari* was granted, set forth the action to be *debt*, the [*487] *certiorari* *itself stated it to be *trespass on the case*.

The defendant had served the plaintiff with a rule to assign errors, before the expiration of which, an application was made to Mr. Justice *Kent*, for an enlargement

Chief Justice, "this is fatal." Can there be a doubt on the point? For how can the overseers of any other town than that where the offence was committed have a right to sue? The plaintiff, therefore, did not show any title. Mr. Justice Spencer adds, "that time and place were wanting." They were necessary for the same reason. He further states, "nor does it negative the *qualifications* of the proviso." If for "proviso," we read "clause," a reading that the law of the case demands, and which it might be presumed every man of the profession must see, from the word "*qualifications*," is a misprision either of the reporter, or of the press, the case is so far unimpeachable; for the declaration should have negatived the license. Livingston, J., states as necessary to be done, what was done in *Picket v. Weaver*; a specification of the liquor; but adds hypothetically the negativing the liquors in the proviso; which, in truth, was unnecessary, as is decided in *Bennett v. Hurd*, 3 Johns. Rep. 438. What, then, does the case of *Blasdel v. Hewitt*, determine? 1st. That in a *qui tam* action under the above statute, as a moiety of the penalty is given to the overseers of the poor where the offence is committed, the declaration must allege the place, to give a title to the plaintiffs. 2d. That for the same reason, time and place are necessary. 3d. That as the enacting clause specifies a qualification which would discharge from the penalty, that qualification must be negatived. 4th. That the liquor should be particularized, with a *dubitation* as to the negation of these liquors mentioned in the proviso.

It is hoped that the preceding elucidation will clear the case of *Blasdel v. Hewitt*, from the obloquy which, it is conceived, has been rather unjustly cast upon it. The opinion of the judges are, with the exception of the word "proviso," certainly reported as pronounced; and it is presumed the case is not the less law, because three or four reasons warrant the judgment.

With respect to the complaint in a justice's court, see Code of Procedure, sec. 64; Waterman's Treatise on the Powers and Duties of Justices of the Peace in the State of New York, pp. 85, 86.

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of the time, which was ordered on an affidavit of the plaintiff's attorney, specifying the original cause of action, and that the describing the cause as a trespass on the case was a mistake.

Woods, on this affidavit, now moved for leave to (a) amend the *certiorari*, by striking out the words "trespass on the case," and, in their stead, inserting the word "debt."

Ordered accordingly.

 LIVINGSTON *against* ROGERS.

Practice as to entering causes for argument.

The court ruled, that causes which had been noticed for argument, und duly entered by the clerk, if not brought on, are to be renoticed to the clerk for him to re-enter, as they will not be, *of course*, carried over to the calendar of the next term. (b)

 DEN *against* FEN.

Feigned issue. Inquest.

If, in a feigned issue from the court of chancery, an inquest be improperly taken, relief must be sought in this

(a) See *Schoonmaker v. Trans*, 2 Caines' Rep. 110.

See also *Kissam v. Morris*, 2 Wend. 259; *Clapp v. Bromagham*, 9 Cow. 304; *Dexter v. Hoover*, 2 Cow. 526; *Bird v. Silsbie*, 1 Cow. 582; 1 Cow. 41. Id. 38.

(b) See *Codwise and others v. Hacker*, ante, 75, n. (b)

Jones v. Emerson.—Zobieskie v. Bauder.

court.(a) And if notice of trial has not been given, it will be set aside, with costs, to be paid by the plaintiff's attorney.[1]

JONES against EMERSON.

On production of a certificate, under the bankrupt law of the United States, granted in a sister state, the court will discharge.

THE defendant had obtained his certificate under a commission of bankruptcy, issued against him in Connecticut; he was afterwards arrested, in this state, at the suit of the plaintiff, but, on production of his certificate, the court ordered him to be discharged.(b)

ZOBIESKIE against BAUDER.

The court will not change the *venue* on an affidavit saying there is a party spirit in a county against the person applying.

THIS was a motion by the defendant to change the *venue*, in an action of slander, from the county of Albany [*488] to *that of Montgomery, on an affidavit that "the cause of action arose in the latter county, and not elsewhere, and that the attendance of a large number of witnesses, on his part, would be necessary at the trial, all of whom resided in Montgomery and its contiguous county, Herkimer."

(a) *Doe v. Roe*, 1 Johns. Cas. 402. If it be ordered by this court, and any difficulty arise in making it up, it must be settled by a judge or commissioner at chambers. *Richards v. Brown*, 7 Johns. Rep. 320.

[1] As to signed issues, see Code of Procedure, sec. 72.

(b) But they will not on the mere issuing a commission of bankruptcy against him. *McMaster v. Kell*, 1 Bos. & Pull. 302.

 Zoblieskie v. Bauder.

The plaintiff, to retain the *venue* where he had laid it, swore, "that *some* of the slanderous words, for which he instituted this suit, were spoken of him, as he verily believes, and has been informed, in relation to his public capacity, as canvasser of an election for senators for the western district; that the defendant is classed among those whose political opinions are different from his own; and that, on account of the violent party spirit which prevails in Montgomery, he believes an impartial trial cannot be there had."

Per Curiam. We do not think the plaintiff entitled to retain the *venue* in Albany. The court will not presume that an impartial trial cannot be had, merely because the parties differ in politics, and a violent party spirit prevails in Montgomery. If the plaintiff had stated that the inhabitants of that country had generally prejudged the question; or were particularly interested in it; or that, for certain reasons, they entertained a prejudice against him; or, that the defendant was a person of uncommon influence, it might have altered the case. It does not follow, that because some of the words were spoken of him as canvasser of an election for the western district, that the inhabitants of Montgomery will be more partial than those of any other county, for in the event of such an election, the citizens of the whole state have nearly the same interest. If violence of party spirit (which in free governments will always rise to a certain degree) be a reason for changing a *venue* between suitors of various political sentiments, there will be no end to applications of this kind, and after all, where will a county be found entirely free of it? We hope that no difference of this kind will ever influence deliberations within a court of justice, or prevent the decision of any controversy on its real merits.(a)

Venue changed.

(a) That the disposition of the inhabitants of the county is unfavorable to turnpikes, is no cause for changing the *venue* in a turnpike cause. *New*

Bowne v. Shaw.

[*489] BOWNE, surviving partner of BOWNE & EMBREE,
against SHAW.

THE SAME *against* NEILSON and BUNKER.

If both insurer and insured on lawful goods, in a policy containing the usual clause of warranty against contraband, know there is contraband on board, the warranty against loss under the clause against illicit trade and contraband of war will apply only to the goods insured. The suit for a return of premium must be against the underwriter, not the broker, though the assured be themselves underwriters and the broker employed by both parties.

THESE were two actions on a policy of assurance on the cargo of the schooner Polly, in which verdicts were taken for the plaintiff, subject to the opinion of the court on a case made, with liberty to turn the same into a special verdict.

The only question in the first cause was on the effect of the warranty against loss, "by capture, or detention for or on account of any illicit trade, or trade in articles contraband of war."

The facts were shortly these; the property insured, no part of which was contraband, really belonged to the plaintiff and his deceased partner, who were also owners of the schooner. They, however, as agents for Joseph M. Stansbury, shipped on his account, in the same vessel, other articles which were contraband, and Embree even made out the invoice in his own hand-writing. The difference of premium between contraband and other goods for

Windoor Turnpike Company v. Wilson, 3 Caines' Rep. 127. Nor in a cause by a corporation of a city, the interest of the citizens, merely as being such; *Corporation of New York v. Dawson*, Caines' Prac. 129, nor that one of the parties to the suit is sheriff of the county. *Baker & Sloane v. Sleight*, 2 Caines' Rep. 46. See *ant*, p. 4, n. (a), and 123, n. (a).

See also *Messenger v. Holmes*, 12 Wend. 203; *The People v. Webb*, 1 Hill, 179; *The People v. Vermilgea*, 7 Cow. 108; *Bowman v. Rly*, 2 Wend. 250; *Scott v. Gibbs*, 3 J. C. 116.

Bowne v. Shaw.

that voyage, was 21 per cent. At the time, however, of subscribing the policy, Shaw knew there were contraband articles on board: Neilson and Bunker did not; and, as soon as they did know it, insisted on being discharged from the policy. This the plaintiff agreed to do, but did not erase their names from the instrument. The vessel was taken, and, together with her cargo, condemned as lawful prize. In promulgating the sentence, on the 13th of December, 1800, the judge rested himself on the general interest of the plaintiff in the contraband. This he inferred from its appearing that Stansbury was part owner of the vessel in the September preceding, and there being no evidence of his having ever alienated his share. He also relied on the invoice of the contraband being in the handwriting of Embree. It was, however, admitted, that the plaintiff had not, either directly or indirectly, any interest in the contraband articles.

In the case against *Neilson* and *Bunker*, the return of premium was the sole object of the suit. The defendants contending the broker was as much the debtor for the premium to the assured as the assurer, and, therefore, the action improperly *brought against them. The [*490] facts on this point are fully detailed in the opinion of the court.

Hoffman, for the plaintiffs. The court is called on to say whether the warranty is confined to the goods insured by the policy, or shall be considered so extensive as to guard against all losses, whatsoever they may be, arising from any article on board which may be contraband. There is no position of law more known, or more acted on, than this; the mere letter of a contract is not to be the rule of exposition. It is to be construed according to the spirit, and expounded according to the intent. If so, though the words be large enough to cover all goods, we may examine into the intent, which cannot be better done than by inquiring into the the reason of introducing this

Bowie v. Shaw.

clause; the mischief it was meant to redress, and the remedy it was designed to afford. It owes its origin to *Seton, Maitland & Co.* They insured contraband merchandize, without communicating its nature, and this court decided a neuter need not avow the quality of shipment, all goods being to him lawful trade.^(a) To communicate to the underwriter the particular species of commodity shipped, and yet to warrant only as to that commodity, was the clause introduced into our policies. The conduct of *Neilson and Bunker*, show this construction ought to be adopted. On being informed there were contraband articles on board, they desired to be released from their responsibility; this was unnecessary if the warranty covered those articles. The generality of the construction is against it. An importer must warrant against transactions and parties thousands of miles distant, and always in the dark. This would destroy insurance itself. Besides Shaw, underwrote with a knowledge of all the circumstances, and must be presumed to have taken the risk of consequences from contraband articles on himself. Our construction, therefore, as to him, must prevail

Pendleton and Harrison, contra. The intention of introducing the clause, on the construction of which the whole of this controversy depends, was to relieve the underwriter from his general liability. It was an exception from what was considered as the effect of the policy. Being [*491] so, the exception *must be co-extensive with the effect. The words, also, used for this purpose, are equally large. They are, "for or on account of *any* illicit or prohibited trade." But, in deciding the present case, it is not necessary to determine the universal operation of the clause in question. The plaintiff here was owner of the vessel. He is presumed consant of all that comes on board. By the old maritime law, his vessel was liable to

(a) The case alluded to is *Seton, Maitland & Co. v. Law*, since reported in 1 Johns Cas. 1.

BOWNE v. SHAW.

confiscation for having contraband on board, merely from the circumstance of his supposed knowledge. This, on general principals, would affect the cargo which belonged to him, because the taint of contraband is communicated wherever there is privity.^(a) It is only in modern days that we have had the rule relaxed, but that is only when actual knowledge is not proved. Here the reverse is the case, and the circumstance of the plaintiff's partner having written out the invoice, was a principal ingredient in causing the condemnation. In the case of *Neilson and Bunker*, allowing the plaintiff entitled to recover, it must be from the broker, and not from the defendants.

Hamilton, in reply. It is contrary to the principles of a warranty, that it should extend to all things. It can relate only to the subject matter insured. When we warrant of a certain thing, we warrant of that thing alone. When we warrant against acts, we may warrant against the acts of all the world. The intent of the clause cannot be doubted. It was framed by myself to avoid the construction contended for on the other side, and to confine the operation of it simply to the article insured. I have heard that every new clause in an instrument is but a fertile source of litigation, and it is with regret I find in myself a personal verification of the truth of the remark. But whatever may be the construction of the effect of the warranty, it cannot touch the present case, because all was known to the defendant. I cannot, however, agree that the operation of the clause is to be different against different persons. The rule of law must be the same as to all.

LEWIS, Ch. J. delivered the opinion of the court. The question between the parties of the suit against Shaw, arises upon the *warranty against loss by capture or detention for trading in articles contraband of war*. The effect which contra-

(a) See the case of *The Franklin*, 3 Rob. Ad. Rep. 217, and the note there, v. 221, (a), where this point is ably treated.

Bowne v. Shaw.

band shall have upon lawful goods when going to [*492] *the port of a belligerent, would be here a proper subject of inquiry, had the fact of the Polly's carrying such contraband been secreted from the insurer at the time of subscribing the policy. But it is stated in the case that the circumstance was within his knowledge. It is, therefore, only necessary to inquire into the understanding the parties had of the contract they entered into. The goods covered by the policy on which this suit is brought were lawful, and insured at a premium of 9 per cent. Certain contraband articles were shipped in the same vessel by the plaintiffs as agents, and insured at the premium of 80 per cent. With a knowledge of this fact, the defendant subscribed the policy, and as both parties must be presumed equally acquainted with the law upon the subject, he, doubtless, took the risk of all the consequences that might result to the lawful from the illicit goods: the warranty extending, in the understanding, of the parties, to the goods only which were the subject of the policy. See *Suckley v. Delafield*, 2 Caines' Rep. 222, and note here.

We are, therefore, of opinion, the plaintiff is entitled to recover as for a total loss.

In the case of the same plaintiff against *Nelson and Bunker*, we think the former entitled to a return of premium. The broker who held funds of both parties, debited the plaintiff in account, with the whole amount of the premium due on the policy, and credited the defendants for their proportion. In May, 1801, he settled with the plaintiff, and paid him a balance which did not include the premium in question. On two several accounts rendered the defendants, the amount of premium still stood to their credit. And although a balance in their favor has always lain in the hands of the broker to a greater amount than the premium, it does not appear to have been left there for the purpose of repayment to the plaintiff. No authority for this pur-

DePeyster v. Gardner.

pose has ever been given, and the defendants must be considered as still withholding it from the plaintiffs.

Judgment for the plaintiffs, in both suits.

DE PEYSTER AND CHARLTON *against* GARDNER.

In a policy on commissions on lawful goods, the warranty against contraband is not broken, though the assured be captain, and consignee of illicit articles shipped on board without the knowledge of the underwriter.

ON error from the mayor's court, upon a judgment rendered against the now plaintiffs.

*By the special verdict, it appeared the insurance [*493] was effected on the commissions of the defendant on "lawful goods" consigned to him, shipped in the same vessel, and for the same voyage, as were mentioned in the preceding cases against Shaw, and against Neilson and Bunker. The defendant was also consignee of the contraband goods of Stansbury, and master of the Polly; but the commissions on the contraband were not insured. It did not appear that the now plaintiffs knew any contraband was on board. In other respects, the facts correspond with those in *Brown v. Shaw*.

LIVINGSTON, J. delivered the opinion of the court. The assured in this policy, has, certainly, made out a case of more favor than the one we have just disposed of; for he was not owner, but only master of the Polly, and therefore, could not refuse to take the goods of Stansbury; nor had his interest, or agency, any influence on the confiscation. The judgment of the court below must therefore, be affirmed with double costs.

Judgment affirmed

Jackson v. Defendorf.

JACKSON, *ex dem.* STARING, *against* DEFENDORF.

If a lot be granted by deed, and its number specified with a reference to a map, the whole lot will pass by the deed, though it there be mentioned as containing fewer acres than it absolutely does.

THIS was an ejectment to recover lands in the county of Herkimer.

The plaintiff in support of his title, adduced a deed to his lessor, by which Nicholas Staring granted to him one certain lot of land, distinguished by the name of lot No. 10, in the new *patent*, in the second tract, on the south side of the Mohawk river, "butted, bounded, and described, as can be more fully made to appear by a map of the said patent, the said lot No. 10, *said* to contain two hundred acres, more or less." The deed then went on specifying the "said two hundred acres" in the *habendum*, covenant of seisin, and clause of warranty. It appearing, however, that lot No. 10, contained more than two hundred acres, the judge at the circuit ordered a nonsuit to be entered. Application was now made to set aside this nonsuit; and the only question was, whether the deed would carry the whole lot, as it contained more than two hundred acres.

Per Curiam. The intent was to convey the whole lot. It referred to the map.(a) When the quantity of acres is

(a) Where lands had been settled under a survey by a deputy from the surveyor-general, but upon a wrong line, and the patents for those lands, without specifying metes and bounds, courses or lines, but described them by a reference to a map in the office of the secretary of state "as there known and distinguished," it was ruled that the locations should be corrected by the map referred to. *Jackson v. Hunter*, 1 Johns. Rep. 495. The words "more or less" are held to be matter of mere description; therefore, if a man convey his land specifying the quantity 100 acres "be it more or less," if it turn out only 60 acres, even equity will not relieve the vendee, for it is his own *laches*. *Anon.* 2 Freem. 106. So if lands be mentioned in a conveyance as containing so many acres, "by estimation," for a small quantity over, the

Regule Generales.

mentioned, *it is only as descriptive of the lot [*494] according to common acceptation. The non suit must be set aside.

Nonsuit set aside.

REGULÆ GENERALES.

ORDERED, that in future, the days for non-enumerated motions be Monday and Thursday, in the first week of term, and Friday, in the second week.

N. B. This alteration was occasioned by the late act of the legislature fixing the terms of this court, in consequence of which, Thursday is become the *quarto die post*. [1] The rules of October, 1801, and July, 1802, are therefore, annulled.

ORDERED, that every person who shall have regularly pursued juridical studies, under the direction or instruction of a professor or counsellor at law, for four years, within

purchaser is not liable, nor the vendor for a small deficiency. *Sir Cloudesly Shovel v. Bogan*, 2 Eq. Ca. Ab. 688, pl. 1. How much will be covered by the words more or less is not accurately defined. In a *lease* of ten acres if they fall short three, the lessee, it is said, must be content. *Day v. Fin, Owen*, 133. On the other hand, if it specify the land by name, and add "containing 10 acres," when in truth it contains 20, the whole will pass. *Thetford v. Thetford*, Savil, 114. We have ruled that a conveyance of a lot by name, "as said to contain 600 acres, be the same more or less," is a performance of the condition of a bond to convey that lot "containing 600" acres, though the lot fell short 125 acres. *Mann & Tbles v. Pearson*, 2 Johns. Rep. 37. Note, the consideration money paid was a gross sum, not a certain sum, at and after the rate of so much per acre.

See also *Van Wyck v. Wright*, 18 Wend. 157; *Root v. Puff*, 3 Barb. Sup. J. Rep. 353; *Luca v. Carley*, 24 Wend. 451; *Lush v. Druse*, 4 Wend. 313; *Jackson v. McConnell*, 19 Wend. 175; *Jackson v. Banenger*, 15 J. R. 471; *Mann v. Pearson*, 2 J. R. 37.

[1] See to the same effect Rule 36 of Sup. Court.

Regulæ Generales.

this state, or shall have been admitted to the degree of counsellor at law in any other of the United States, and practised with reputation, as such, for four years in such state, shall be entitled to a license to practise as counsel in this court; and that the second rule of October term, 1797 be annulled.(a)

In this vacation Mr. Justice *Radcliffe* resigned his seat on the bench.

(a) No person other than a natural born, or naturalized citizen of the United States, shall be admitted as a counsellor or attorney of this court. Rule of August, 1806.

END OF NOVEMBER TERM.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW YORK,

IN FEBRUARY TERM, IN THE TWENTY-EIGHTH YEAR OF OUR INDEPENDENCE

ATTEBURY *against* TELLER, Jun.

In an action on a promissory note, if, in consequence of the plaintiff's attorney having no agent in Albany, the suit be *non-prossed* there for want of declaring, and judgment by default be obtained in New York, and the damages assessed by the clerk endorsed on the note, the court will, when the costs of *non-pros* have been paid, and the judgment in New York vacated, order the damages assessed and endorsed to be struck out, that the plaintiff may, in a second action, proceed to trial without any embarrassment from the former proceedings.

THIS was an action on two promissory notes, on which the clerk had assessed damages.

A former suit had been brought on the same notes which were the foundation of the present action. The attorney for the plaintiff lived in New York, and had not any agent in Albany, near to which the attorney of the defendant resided. Whilst the plaintiff's attorney was proceeding, in New York, to obtain judgment, the defendant's attorney placed up, in the clerk's office in Albany, the usual notice of appearance, and of a rule to declare, after the expiration

Atterbury v. Teller.

of which, no declaration having been received, the defendant, after the regular affidavit of due service, entered a *non pros* for not declaring. During these transactions in Albany, the plaintiff went on in New York, and there obtained, subsequent to the entry of *non pros* in Albany, a judgment *by default; after which the clerk of the court duly assessed damages, and endorsed the amounts on the respective notes. The attorney on record for the plaintiff having been changed, the present attorney discovered the above circumstances, and as the judgment of *non pros* had been entered in consequence of the original attorney for the plaintiff not having had an agent in Albany, he paid the defendant's attorney the costs of *non pros*, and agreed to vacate his own judgment, which was accordingly done.

A second action being now commenced, the plaintiff was apprehensive that the assessment of damages under the first, might be made use of on the trial, as a species of judgment already recovered.

Pendleton, on affidavits containing the above facts, moved for liberty to strike out the assessment endorsed, and proceed to trial on the merits, in the same manner as if the damages had never been assessed.

Van Antwerp resisted the motion, relying on the assessment being conclusive as to the amount.

Per Curiam. Take the effect of your motion, with costs of this application to be paid by the defendant.

Motion granted.

Jackson v. Hammond, — Graham v. Woodhull.

JACKSON *ex dem.* SMITH, *against* HAMMOND.

New *nisi prius* record allowed to be filed, and a *postea* endorsed thereon, according to a judgment of six years antecedent, and execution thereon, upon affidavits showing the probable loss of the originals.

IN this cause, on an affidavit stating a verdict having been, in 1792, taken for the plaintiff, subject to the opinion of the court, on a case agreed on between the parties, on which judgment had been given, in 1798, for the plaintiff; and also, that the *nisi prius* record and issue roll were not to be found in the office of the clerk of this court, nor the *nisi prius* record among the papers of the former clerk of the circuit in which the cause was tried, and if left with the plaintiff's attorney, had been burnt^(a) or lost.

Leave was given to make up and file a new *nisi prius* record, with a *postea* to be endorsed thereon, conformable to the minutes of the trial, and also to enter up judgment and issue execution for the plaintiff, according to the opinion of the court in 1798.

No opposition.

*GRAHAM *against* WOODHULL [^{*}497]

in slander, for saying of the plaintiff that he was perjured, and a particular perjury pleaded in justification, the court will, on affidavit of the absence of the witness by whom it was to be proved, give leave to amend by pleading another perjury, on payment of costs.

THIS was an action brought against the defendant for saying that the plaintiff had been guilty of perjury. To this the defendant had pleaded the general issue, and a jus-

(a) A *f. fa.* having, after levy upon it, been accidentally burnt in the house of a deputy sheriff, the court ordered a new *f. fa.* to be made out and delivered to the sheriff. *White v. Lovejoy*, 3 Johns. Rep. 448.

Graham v. Woodhull.

tification, setting forth a particular perjury committed in an examination before Thomas Cooper, Esq. one of the masters in chancery.

Hoffman moved for liberty to plead another plea, or to give notice of special matter, to be given in evidence on the general issue, in addition to the pleas already pleaded. The application was founded on an affidavit stating the above facts, and also that the pleas were delivered in August last, and issue soon after joined; that at the time of pleading the above pleas, one Gleeson, who could have proved the truth of the above justification, was in New York, or its vicinity, and the defendant relied on being able to produce him at the trial; but, that since that time, Gleeson had quitted this state, and was gone, the defendant knew not whither; that the charge of perjury was true, and that, under the idea of being able to have the benefit of Gleeson's evidence, the defendant had not given notice of justifying by proof of another perjury by the plaintiff before the recorder of New York, on an application for relief under the insolvent law.

Bogert, contra. The defendant's plea of justification is confined to that before the master. The other may, even allowing it to be true, have taken place long since. The question, therefore, is, whether the court will allow a subsequent perjury, admitting it to have been committed, to justify a former charge of perjury. This is an action of slander, and out of the general rule of amending and adding pleas.

Hoffman, in reply. The declaration is general; and, for any thing that appears, both perjuries might have preceded the action, nay, contemporaneous, as they might be in relation to the same discharge. We only ask to amend on the usual terms of paying costs.

 Spencer v. Sampson.

After some little conversation on the bench, in which it was conceived this practice might possibly lead to hunting for instances of perjury, the court granted the motion, on *payment of costs, saying they could not [*498] make any distinction between actions of slander and other cases.[1]

Motion granted.

 SPENCER *against* SAMPSON.

If a cause be important, or intricate, it is cause for a struck jury. In actions for words to obtain it, the truth ought to be denied, and the cause at issue *ut semel*.

THIS was an application, on the part of the plaintiff, for a struck jury, in an action on the case for a libel.

The affidavit on which it was founded stated, that the words spoken of the plaintiff, were concerning him in his official character as attorney-general, were false, and that the cause was at issue.

W. W. Van Ness opposed the motion, and urged, that to entitle to a struck jury, the cause ought to be important *and* intricate; that though he might allow the importance of every cause relating to character, yet its intricacy he must deny, and both these circumstances are necessary by our statute.

Per Curiam. The words of the statute are, "intricate or important." It is of great consequence to this court to protect its officers, and those of the public, in the discharge of their duty. Take your rule(a)

Rule for struck jury.

[1] See *Lent v. Butler*, 3 Cow. 370; *Williams v. Cooper*, 1 Hill, 637.

(a) The rule as to struck juries, for libellous words on official characters is, that they must be spoken of the party in his official character. *Van Vechten*

Foot v. Croswell.

Foot against CROSWELL.

R. P. as last case, and for want of those circumstances rule refused.

THIS was a similar application. The affidavit stated the action to be for libellous words spoken of the plaintiff, exhibiting him in an odious point of view, as guilty of swindling; that a right determination was important to his character in society, and issue joined.

Per Curiam. The plaintiff can take nothing by his motion; his affidavit is defective, in not stating that the words were spoken of him in his official character of district attorney, and in not swearing to their falsehood.

Struck jury denied.

v. Hopkins, 2 Johns. Rep. 373. *Thomas v. Croswell*, 4 Johns. Rep. 491, and the truth of those words denied. When these requisites are complied with, a struck jury will be granted in an action by an attorney-general, (the case in the text,) a district attorney, *Foot v. Croswell*, in the text, the plaintiff having in a subsequent term amended his affidavit, 1 Johns. Rep. 161, a recorder, or *ex officio* director of a banking company, *Livingston v. Oheetham*, 1 Johns. Rep. 61, or a member of congress. *Thomas v. Rumsey*, 4 Johns. Rep. 481. But that the government of the United States, is concerned, is not a sufficient reason for a struck jury, *Hartshorne v. Gelston*, 3 Caines' Rep. 84, nor that the plaintiff, in an action for a libel, was formerly a resident minister from a foreign power, if the transaction be stale, and he long ago superseded. *Genet v. Mitchell*, 4 Johns. Rep. 186. But in an action by a turnpike company for opening a road so near to a turnpike as to affect the tolls, a struck jury will be granted, *New Windsor Turnpike Company v. Ellison*, 1 Johns. Rep. 141. So, it is said, if the dispositions of a county be unfavorable to turnpikes, *New Windsor Turnpike Company v. Wilson*, 3 Caines' Rep. 127, or a town contribute to the expenses of a suit, *Stryker v. Turnbull*, 3 Caines' Rep. 103, or in a Long-Island cause a right of fishery be in question. Value to the amount of 18,000 dollars in two suits have, on an affidavit of eminent counsel as to the importance, been held sufficient to warrant a struck jury. *Livingston v. Smith*, 1 Johns. Rep. 141. But in another case, a total loss of 27,000 dollars was not. *Wright v. Col. Ins. Co.*, 2 Johns. Rep. 211. So where the sum was 1,000 dollars, and a common jury had been discharged, because unable to make up their verdict. *Anon.* 1 Johns. Rep. 314. See also *Parker v. Livingston*, 2 Wend. 296.

 Arden v. Rice.

ARDEN AND CLOSE against RICE, WHITE AND TOWNSEND.

If the court be satisfied a demurrer is put in merely for delay, and the opposite side has noticed the demurrant for argument, who does not appear, the demurrer will be overruled, and a rule for judgment ordered, the party obtaining it stating himself ready to open the rule if good cause of demurrer, or merits, be shown. Judgment may be entered upon a *cognovit* in vacation.

THIS cause had been noticed by the plaintiffs for argument, at the last term, on a general demurrer filed by the defendants to the declaration; the court had, on the statement of the plaintiffs' counsel that the demurrer was merely for delay, overruled it, and granted a rule for judgment, the *counsel pledging himself to open [*499] the rule any day on an affidavit of good cause of demurrer, or of merits. On service of the rule for judgment, the defendants gave a *cognovit*, on which the plaintiff entered up his judgment in the last vacation.

Foot moved to set aside the judgment, contending that it could not be entered but in term.

Some little variance of opinion existing on the bench respecting the practice, on this point, it stood over till the last day of term, when the court thus decided:

Per Curiam. By the 8th rule of April, 1796, judgment, after a default entered, may be entered *at any time* after 4 days in term have intervened. The rule of July term, 1796, ordering all rules for judgment to be entered in term, and not in vacation, was abolished in April term, 1799, and restored the first rule. There is no good reason why four days in term should be given in this case to the defendants, any more than on a warrant of attorney to confess judgment. The defendants take nothing by their motion.

 Gilchrist v. Van Wagenen.

SPENCER, J. dissented, on the ground that the practice had been different.(a)

Motion denied.

 GILCHRIST against VAN WAGENEN AND MOORE.

LAWRENCE against VAN WAGENEN.

Where an attorney has been, from peculiar circumstances, induced to authorize the sheriff to discharge a prisoner, on a single bail, who afterwards turns out insolvent, the court will, if no opposition be made, and the attorney's conduct appear *bona fide*, allow him, after filing common bail under the statute, to put in special bail, for the purpose of obtaining a surrender of the defendant's body, to save himself from liability.

THIS was an application by the attorney of the plaintiffs, for liberty to file special bail in both suits, to enable him to surrender the defendant.(a)

The circumstances, as disclosed on affidavit, were these: the defendant, Van Wagenen, had been arrested in both actions, one of which was for 4,000 dollars, and the other for 400 dollars, at a very late hour of the night, and was by the officer who took him, carried to the house of the plaintiff's attorney, who was then in bed. Being called up, the defendant requested him to take as bail one John S. Moore,

(a) Judgment may be entered in vacation as of the preceding term on a warrant of attorney given in that vacation to enter up judgment on a bond payable immediately. *King v. Shaw*, 3 Johns. Rep. 142. A warrant of attorney should also authorize the entry as of the preceding term, when given in vacation. But except in the above cases, neither interlocutory nor final judgment can be entered in vacation. *Hopetown v. Genet*, 6 Johns. Rep. 325. To enter a rule *nisi* for judgment on the 4th day of term after a verdict, is no violation of an order to stay proceedings. *Hackley v. Hustie & Patrick*, 3 Johns. Rep. 253. It may be entered on any day in term. *Roe v. Rock*, 6 Johns. Rep. 330.

(a) See ante, p. 11, n. (a), and *Van Rensselaer v. Hopkins*, 3 Caines' Rep. 136, n. (a).

Ex parte Reynolds.

who was at first refused. But on the defendant's representing the distressed state his family would be in; and the shock it would be to his credit should he go to jail, the attorney, on receiving faithful assurances that sufficient bail should be put in by nine o'clock the next morning, agreed to accept *John S. Moore as bail for [*500] that night, and the defendant was, accordingly suffered to go at large. The defendant, however, instead of putting in satisfactory bail, as he had promised, went immediately on board a vessel that he owned; which was bound for the West Indies, though he knew at the time that Moore, who has since been declared a bankrupt, was then insolvent. On this the plaintiff's attorney filed common bail in each of the suits, according to the provisions of the statute; but having been threatened by the plaintiffs with being called on for the amount of their debts,

Boyd made the application above mentioned, which, not being opposed, was granted.

Motion granted.

EX PARTE P. REYNOLDS.

If a man be turned out of possession, by a mistake in executing a writ of possession against him, instead of another, the court will, on motion, grant relief, and order restitution.

THIS was an application for a writ of restitution. The facts are stated in the opinion of the court, which was delivered by

SPENCER, J. It appears by the affidavit of the deponent, (and the allegation is uncontroverted,) that in October last, upon a writ of *habere facias possessionem*, issued out of this court, in the case of *Jackson*, ex dem. *Low and others*, the

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deponent was turned out of possession of a house and 50 acres of land, being part of lot No. 37, in Romulus, in the county of Cayuga; that the possession held by him was delivered by the agent of Mr. Low; that the deponent was, prior to the commencement of the ejectment against James Reynolds in peaceable possession of the land from which he was expelled; that the object of the suit against James Reynolds was for the recovery of different lands which he held on another part of the lot, and that the two possessions were separate and distinct.

It is a settled rule of practice, that no tenant who was in possession anterior to the commencement of an ejectment, can be dispossessed upon a judgment and writ of possession, to which he is no party. It is the opinion of the court, that Peter Reynolds is entitled to relief, and that a writ of restitution issue to reinstate him in the possession of the premises from which he has been thus irregularly ousted.

Restitution ordered.



[*501] *DURKEE *against* BRACKETT, Q. T.

If a justice of the peace, in a cause before him, admit a plaintiff to be sworn and testify as a witness in his own cause, this court will grant a rule, or *certiorari*, as the party may be advised, to have that matter returned.

THIS was an application for a rule, or *certiorari*, to be directed to the justice of the peace before whom the cause was tried, requiring him to certify whether Ichabod Brackett, the plaintiff before him, was not by him permitted to be sworn as a witness, and testify in his own cause.

Harrison, in support of the motion. As no bill of exceptions will lie in this case, (a) the injury will be without rem-

(a) 1 Rev. Laws, 376. The words of the act are, "When any one who is

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edy, unless the court, by virtue of their superintending jurisdiction, please to interpose. This they have authority to do from their general controlling power. This differs from the applications to return evidence, because there it would be to assume a right to determine on facts, matters cognizable by a jury alone. The granting of a *certiorari* is not confined to reasons that appear on the record. In 4 Vin. 342, letter D. pl. 7, tit. *Certiorari*, the writ was allowed, to inquire whether the defendant, who had pleaded his protection as the *king's* servant, was attending on the *king* for his own business, or the *king's*.

Henry, contra. This is, in substance, to bring up the fact; and this court has decided it will not oblige a justice to return evidence.(a)[1]

Per Curiam. Take your rule, or *certiorari*, as you may be advised.

Motion granted.

impleaded before any judges or justices, doth allege an exception," &c. Therefore, *quære* as to this, and see 2 Inst. 427, (2).

(a) By Laws N. Y. sess. 28, April 9th, 1808, c. 93, s. 3, he must return specially as to the facts set forth in the affidavit on which the *certiorari* is granted. See *Schoonmaker v. Trans*, 2 Caines' Rep. 116. See Code of Procedure, secs 360, 362.

[1] In *Church v. Hubbard*, on error from the district court of Massachusetts, 2 Cranch, 239, a question was suggested by Chase, J., whether a bill of exceptions would lie to a charge given by the judge to the jury, unless on a point upon which the opinion of the court was prayed; doubting whether it would within the statute of Westminster. Marshall, Ch. J., thought it would, observing, that if in this country the question could not come up by a bill of exceptions from a district court, the party would be without remedy.

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JACKSON; ex dem. HOGEBOOM, against STILES, GRIFFIN,
tenant in possession.

In ejectment, on a motion to set aside the rule to appear and enter, &c., if the application be founded on irregularities to be supported by inspection of the declaration, &c., on file, and the plaintiff produce affidavit of due service, &c., it will be presumed that all was regular, the tenants not producing the declarations and notices served, especially if, by granting the motion, the statute of limitations would attach.

In this and several other actions, under demises from the same lessor, the tenants moved to set aside the rules which had been entered to appear and enter into consent rules, or that judgment go against the casual ejector.

The notice of motion stated that the applications would be grounded on an inspection of the declarations, notices, and affidavits on file, by which it would appear that three of the notices were directed in blank, and one to James Perkins, instead of the tenant, James Kerman.

Harrison. In ejectment the declaration is analogous to process, and ought, therefore, to be governed by [*502] the same *rules. If a sheriff were to serve one man with a writ directed to another, it certainly would not be a legal service, and, in ejectment, a notice to A. is not a notice to B. Kerman can never be Perkins. The court will not permit the possession of one man to be changed by proceedings against another. *Ex parte Reynolds*, this term. (Ante, 500.)

Woodworth (Attorney-General) read an affidavit, stating that James Kerman was personally served, and that the declaration, with notices annexed, were served on the tenants. He also referred the court to *Jackson v. Stiles*, ante. 249, for the same facts, on a former application in this very cause. The effect of the present motion, if allowed, would be, he said, to try and decide the cause against the

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lessor of the plaintiff, as the limitation of the statute will then apply. See *Jackson v. Horton*, 3 Caines' Rep. 197, and the note there.

Harrison, in reply. The effect of the statute cannot be taken into consideration. Suppose trespass for carrying away goods brought, instead of *assumpsit*, and the six years passed, would the court interfere to prevent the operation of the statute? This case deserves no indulgence; twelve months elapsed before the application to amend in August last was made.

Per Curiam. The application in these suits is founded on a reference to the proceedings on file, by which, it is said, it will appear that one of the notices was misdirected, and the others in blank. In the affidavit on behalf of the plaintiff, it is sworn, that the direction of the one served on James Kerman, was to him in his name, and that the tenants were duly served: if the facts were otherwise, it would have been very easy to evince them, by producing the several notices, &c. actually served, without referring to those on file. It is, therefore, to be presumed that the services have been regular. The court will, in the present case, support this presumption, as otherwise, by the intervention of the limitation of the statute, the plaintiff would be barred. The case of *Reynolds* is very different from this; there no proceedings had been served on him; a different tract of land was claimed; the first intimation he had was by an execution which turned him out, and that very execution against *the possession of [*503] a different man. We there protected the right of the party, and we do so here. The tenants can take nothing by their motion.

Motion denied.

 Kirby v. Watkins.

J. and E. KIRBY *against* WATKIES.

If there be sufficient time before a circuit to admit of the return of a commission in which the plaintiff has not joined, though the court will not vacate the rule on which it was granted, they will give leave to proceed to trial notwithstanding.

THE defendant had, after due notice, obtained a rule in the last term for a commission, in which the plaintiff did not join, to examine a person in Port Republican, and since then had not given any notice of further proceedings under the commission. On these facts,

Harrison moved to vacate the rule.

Per Curiam. Let the rule be so far vacated as to permit the plaintiffs to proceed to trial notwithstanding the commission.

Motion granted.

N. B. On a commission to England, the court will, after eight months without a return, give leave to proceed to trial, notwithstanding the commission; but this does not prevent cause being shown, at the circuit, why the trial should not then be put off.(a)

(a) As the permission to go to trial does not prevent showing cause at the circuit for a further postponement, it will be granted, though the time for returning the commission be not expired; *Pell v. Bunker*, 2 Caines' Rep. 46, *a fortiori* if it be; *Bushereau v. Le Guen*, 2 Johns. Rep. 196. *Rush v. Cobbet*, 2 Johns. Cas. 70, against which a *belief*, sworn to by the defendant's counsel, that the plaintiff has by his acts delayed the return is not sufficient. *Id. ibid* Where, from circumstances over which the defendant could have no control it appears, even after a second commission, that a return could not have been had, and that the testimony expected is almost conclusive on the question, the court will vacate a rule permitting to go to trial, and give the defendant his full eight months from the issuing the second commission. *Ferris v. Smith*, 2 Caines' Rep. 253. The time for the execution and return of a commission arrived in England, is said to be three months. *Jahel v*

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**JACKSON, ex dem. ROSEKRANS, against STILES, HOWD
tenant.**

In ejectment, the court will allow of excuses for defaults to protect the possession, which, in other cases, would not be received. If the consent rule, &c., have been actually forwarded in time to be delivered to the attorney of the plaintiff in ejectment, and be, by mistake, filed in the clerk's office, instead of being served, the court will set aside a judgment on such a default, and if a writ of possession has issued, award restitution, on payment of costs.

THIS was an action of ejectment, brought to recover lands to which the tenant derived title under the state.

The declaration, &c. had been duly served on the tenant, and by him delivered to the Attorney-General on the 14th of April last. The notice was of course for the last May term, and the consent rule and plea were, immediately afterwards, drawn and forwarded to a clerk in the office of the clerk of this court in Albany, directed to the attorney for the plaintiff, who the Attorney General believed to reside in or near Albany. The consent rule and plea were duly received, but, from inattention in the clerk to whom they were transmitted, they were filed instead of being

United Ins. Co., cited *post*, 517. If the party has an agent in England, who is instructed to forward the proceedings four months from the issuing the commission, it is, in a statement of the same case in another place, (*Caines' Prac.* 427,) said to be sufficient. When a plaintiff has delayed his own commission, judgment as in case of nonsuit, for not going to trial will be granted, as in other cases, unless he stipulate. *Coles v. Thompson*, *post*, 517, and *Miller & Graham v. De Peyster*, there cited. But the application will be refused if the delay complained of appear to have arisen from the neglect of the defendant's commissioner. *Coles v. Thompson*, 2 *Caines' Rep.* 47. The return should be by the commissioner to whom delivered, or a person who has received it from the commissioner, *Murray v. Mar. Ins. Co.*, *Caines' Prac.* 425, and should specify that the depositions were taken on oath; *Baile v. Cochran*, 2 *Johns. Rep.* 417, a statement of which, in the caption of the depositions, by saying the witness "was produced and sworn," &c., if signed by the commissioners, is enough. *Bolts v. Van Rosten*, 4 *Johns. Rep.* 130. See *ante*, p. 4, note [1], and 74, n. (b).

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served. The consent rule and plea not having [*504] been received, the plaintiff took *his judgment by default against the casual ejector, sued out a writ of possession, and turned out the tenant. On these facts, it was intended to move the court, last term, to set aside the judgment and writ of possession, and that a writ of restitution should issue; but it being inconvenient to both parties to bring it on then, a written agreement was entered into, consenting to postpone the application till this term, and that the delay should not be deemed a *laches* in the tenant.

Caines, on the above facts, substantiated by affidavit, now moved to set aside the default and subsequent proceedings, and that a writ of restitution should issue. There were, he said, but two objections which could be made to the motion; 1st. That the default was not accounted for; 2d. That the application ought to have been made at an earlier day. As to the first, this court had allowed the miscarriage of pleas, when sent by the mail, to excuse a default (*Hudson v. Henry*, ante, 67,) and though this was not exactly that case, it was within its principle; for, the defendant's attorney had taken every necessary step in due time. On the second point, the written agreement was a complete answer. In addition to this, no injury could be induced by granting the application: if the plaintiff had any right, he would, on a trial, be able to prove it; on the other hand, if the motion was denied, it might be of the utmost prejudice, as it would shut out the defendant from all possibility of showing his title. Besides, the rule was not asked for but on payment of all costs, so that the plaintiff would be where he was, with all his rights, titles, and even his pocket unimpaired.

Van Vechten, contra, read affidavits stating that the lessor of the plaintiff had been duly put in possession of the lands in question by the sheriff of the county, and had, on the

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same day, granted a lease of the premises to a third person; that in conversations with the lessor of the plaintiff, he has acknowledged that he held under the patent of Clifton Park, whereas the premises delivered under the writ were claimed under that of Kayaderosseras, and that the lessor of the plaintiff had acknowledged he believed they were in Kayaderosseras. He, therefore, insisted that, as now the right of a third person was implicated, the court *would not interfere; that the title was ac- [*505] knowledged, and it would, therefore, be useless. The excuse for the default he also denied to be similar to the case relied on.

Caines, in reply. The lease granted since the execution of the writ, and before the signing of the agreement, must have been so recent as to admit of no improvements. The third person, therefore, can sustain no injury. Allowing the right to be with the lessor, still it cannot be thus tried on affidavit. A jury is the tribunal for its determination. In referring it to a jury, he has all his rights, and the expense he has been put to we agree to pay. He, therefore, cannot suffer; but the defendant may, as he cannot obtain compensation from the state unless he shows a defence, to which alone he asks to be admitted.

Per Curiam. The proceedings on the part of the defendant certainly have not been perfectly regular, for they ought, in strictness, to have been sent to the agent of the plaintiff's attorney. It appears, however, that every measure necessary for the defence was actually taken, though from an idea on one hand of the clerk of the defendant's attorney, that the plaintiff resided near Albany, and a mistake on the other, in the office of the clerk of the court, the papers never reached their proper destination. In ejectment, as it is the creature of the court, every thing will be done to promote the justice of the case, according to right, and the court will go further to protect the possession when it can

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be done without injury to the plaintiff's claim, than it is willing, in other cases, to proceed.(a) As, therefore, there was a full knowledge in October last of an intention to make this application, and the transactions are all of a recent date, we are of opinion that the default entered against the casual ejector, the judgment thereon, and the writ of possession sued out, be set aside, and a writ of restitution issue, on payment of costs.

Motion granted.

KIRBY *against* COGSWELL.

An endorsee of a firm of which he is a member may, on an endorsement made by himself in the style of the partnership, maintain an action against the maker of a promissory note. A judge's certificate of probable cause, does not stay proceedings unless accompanied with notice of motion.

THIS was an action on a promissory note by the endorsee against the maker. It appeared on the trial, which took place during the last Albany circuit, that the plaintiff was one of a firm, and had endorsed the note, in [*506] the name of the house, *to himself, and now sued in his individual capacity. On this account, an objection was taken, the defendant insisting that the plaintiff could not, by his endorsement in the style of the copartnership, transfer to himself,(b) in his private character, the note so as to give a right of action. This, however, being overruled, the defendant, within the time limited by a rule, made a case, and served it on the plaintiff's attorney. He,

(a) Where the default was regular, and no trial had been lost, the court recognizing the case in the text, upon an affidavit of merits, set it aside; and admitted the tenant to defend. *Jackson v. Stiles*, 4 Johns. Rep. 489.

(b) There can be no doubt of an individual partner being a legal endorsee of his firm; *Bulton v. Puller*, 1 Bos. & Pull. 546; but there would be great difficulty in proceeding against his endorsers.

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observing it to be incorrect, made another, detailing the facts accurately, and also served his, titling it an "amended case." *Milward v. Hallett*, see *ante*, 344.

On the first day of November term, the plaintiff filed his certificate of trial, *nisi prius* record, with the *postea* endorsed, and entered a rule *nisi* for judgment.

On the 8th of November, the defendant, taking no notice of the case intended as an amendment, obtained, on his own statement of facts, a certificate from Mr. Justice *Kent* to stay proceedings. This, with a copy of his case, *but without any notice of motion* he served the next day on the plaintiff's attorney, observing to him, at the same time, that the amendments according to the practice of the court, ought to have been proposed and not sent in the shape of a new case. The plaintiff's attorney then offered to make a fair statement, as should be agreed on, alleging his ignorance of the strict rules of making a case. The defendant's attorney seeming to evade this, the plaintiff, on the 16th of November, served a copy of a bill of costs in the suit, with regular notice of taxation, which he proceeded to execute, signed judgment, and issued a *feri facias*.

Van Antwerp now moved to set aside the judgment, and all subsequent proceedings, insisting that the certificate of the judge was a complete stay, without any notice of motion annexed, for the plaintiff had, as well as the defendant, a right to bring on the argument upon the case made.

Per Curiam. The question is, as to the operation of a certificate of probable cause to stay proceedings.(a) The

(a) The necessity of accompanying a certificate of probable cause, with a notice of motion, is settled by the case in the text. On a non-enumerated motion it suspends the proceedings, during the term for which the notice is given, (4th Rule, January, 1799,) if the certificate be in general terms. If only till the 4th day of term, and there be then such a press of business, that the non-enumerated lay over, the certificate is by operation of law enlarged till the next non-enumerated day. *Caines' Prac.* 36. Where a certificate is granted after the 4th day of term, it enlarges the time for

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4th rule of January, 1799, settles that, at the time of service of the order, it must be accompanied with a notice of motion. The right of the opposite party to notice for argument, does not take away the necessity of notice. [*507] The mere certificate itself is no stay. The defendant, therefore, can take nothing by his motion and must pay the costs of the present application.

Motion denied, with costs.

IN THE MATTER BETWEEN THE MAYOR, ALDERMEN, AND
COMMONALTY OF THE CITY OF NEW YORK, AND THE
PRESIDENT AND DIRECTORS OF THE MANHATTAN COM-
PANY.

A judge cannot revoke his own warrant, appointing appraisers under the 5th sect. of the act incorporating the Manhattan Company. A freeholder in the city of New York is, under that section, incompetent to act as an appraiser of the damage done to the streets by laying the Manhattan pipes. Want of time and place in a notice of preferring a petition is fatal. A rule *nisi* leaves the party at liberty to come in and oppose when the court is applied to for making it absolute. Whether service of a notice on a cashier of a bank be good service, *qua*.

THIS was an application to make absolute a rule *nisi*, obtained last term, to confirm the report of William Popham, Abijah Hammond, and Richard Hatfield, three

moving in arrest of judgment to any other day. *Bayard v. Malcolm*, 1 Johns. Rep. 210. If the motion be enumerated, it suspends the cause till heard, or the certificate be vacated. *Jackson v. Brownell*, 3 Caines' Rep. 151. To give effect to the certificate, a copy should be served; a mere notice of it is not enough. *Cheetham v. Lewis*, 2 Johns. Rep. 104. To bring a party into contempt for disobeying the certificate, the original should be shown at the time of serving the copy. *Howland v. Ralph*, 3 Johns. Rep. 20. There is no difference in the practice under an order to stay proceedings, and a certificate of probable cause.

As to staying proceedings on making a case see also. *Graham's Prac.*, 2d ed. 334; 2 Wend. 246; 1 Cowen, 598; Code of Procedure, secs. 401, 264, and 348; and *ante*, p.

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persons who, under the fifth section of the act incorporating the Manhattan Company, had been nominated and appointed by his honor Mr. Justice *Kent*, to estimate the damage done to the pavements of the streets of New York by the Manhattan Company, in laying down the pipes which convey water through the city.

Harrison, in support of the rule, read a petition from the Mayor, Aldermen and Commonalty of New York, stating, that all the streets and highways in the city are, by law, vested in them and their successors, and were so previous to the 2d of April, 1799.

That the President and Directors of the Manhattan Company, shortly after their incorporation, and without license from the petitioners, had dug, in several of the streets, trenches for laying the water pipes of the Company, and materially injured the pavements.

That ineffectual endeavors had been used to bring the Company to an agreement with the petitioners, and, therefore, they prayed persons to be appointed to estimate, &c.

He stated, also, from affidavits, that on the 6th of July last a copy of the above petition was served on the Manhattan Company, by delivering the same to their cashier; that this was previous to the delivery of it to Mr. Justice *Kent* for his warrant; (but how long previous the affidavit did not state;) that on the 12th day of the same month the warrant, appointing the three persons above named, was issued; that on the 26th of the same July, a copy of the warrant *was served on the cashier of the [*508] Company, and, on the next day, a notice that the person so appointed would meet at 10 o'clock of the same day to proceed in the duties assigned to them.

Hamilton, contra, insisted that, from the facts, as they appeared on the affidavits of the other side, it was manifest the notice of an application to appoint persons to estimate was imperfect; it specified neither time nor place, when and

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where the Company might attend to oppose the nomination of improper persons. That this was analogous to, and by the act intended as, a substitute for a trial by jury; that therefore, the same rights as would be had in that mode ought to be preserved in this, and of those rights that of challenge was one. He then read an affidavit by the President of the Manhattan Company, showing that Mr. Hammond was a very large freeholder in New York, and there had his principal residence; and, also, that the original cost of paving the places was only 3,525 dollars, though the damages which had been assessed, as a compensation for the injury, amounted to 6,881 dollars. From hence he contended that Hammond was an interested person, (though he might have acted perfectly conscientious,) as the houses of proprietors were assessed for the pavements opposite their lots, and the more was gotten from the Company the less would the freeholders be called on to pay. The notice, also, of attending the meeting of the persons appointed by the judge's warrant, was of a piece with the rest; it was, as appeared by Mr. Remsen's affidavit, served on him, as cashier of the Company, only ten minutes before the assessors were to assemble. In the next place, it might be a question how far any service was valid which was not served on the President himself, he being the head of the Company. It was also doubtful whether the judge had any jurisdiction; the act gives him authority only when the Company and the Corporation *disagree*; the petition did not state this, but that they *did not agree*.

Harrison, in reply. The act does not prescribe any time at which notice is to be given. It is evident, however, that there was no intention of surprise, as there were six days between the service of the petition and the [*509] judge's warrant. *Supposing the analogy to trial by jury to be correct, still the Company were too late. The service of the petition was enough to set them on inquiry, and they have lain by till the whole business

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is finished, and then, because they think themselves aggrieved, they come forward. Were a party to be thus silent, and take the chance of a verdict, it would be too late for him to urge any challenge to a juror. The petition states that all endeavors to bring the Company to an agreement were ineffectual; whether this amounted to disagreeing, or only to not agreeing, and the distinction to be taken between them, he declined to argue.

Per Curiam. The application is, to affirm the report of appraisers acting under the fifth section of the statute incorporating the Manhattan Company. The act directs, that "in case of disagreement, &c. it shall be lawful for the judges of the supreme court of this state, or any one of them, (not being an inhabitant of the said city,) upon the application of either party, to nominate and appoint three indifferent persons to view, examine and survey the said lands, &c. and to estimate the injury sustained as aforesaid, and to report thereupon without delay; and upon the coming in of such report, and the confirmation thereof by the said court, the Company shall pay the sum mentioned in the report," &c. On the part of the Company, the first cause shown against confirming is, that the application to Mr. Justice *Kent* was made without due notice. The second, that one of the appraisers was interested, and, therefore, an improper person. The third, that the damages awarded are excessive. As to notice, it is not denied that it was necessary, though it is insisted that which was given was sufficient. The petition appears to have been served on the cashier,^(a) and contains neither time when, nor place where, the application would be made to the judge. The notice, then, is altogether irregular. It wants the necessary requisites of time and place to enable the opposite party to attend and object to the appointment of appraisers. On the second point, the affidavit of the President shows, that

(a) "If the head is not warned, (notified,) the body is not." *Agreed*. Bro. tit. Corporation., pl. 6

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one of the persons nominated was interested; and this again proves the importance of notice, for had the [*510] Company appeared *they might have shown his interest, and hindered his appointment. This interest is not denied by the corporation; they merely urge that it is alleged at too late a period. As to the damages, an injury to the amount of 6,881 dollars is assessed on that which originally cost only 3,525 dollars. The corporation, it is true, say that the streets were much injured, but this ought to have been shown more satisfactorily, and is sufficient to send this matter for further investigation. A question, however, has been made, whether the Company can now avail themselves of these objections? They must be at liberty so to do now, or they would be remediless. There was not any notice given them to attend before the judge; therefore, to him they could not state their objections. Nor could they have applied to the judge who granted the warrant, to make a further or other appointment, for under the words of the act, the judge cannot revoke his warrant. He, therefore, is *functus officii*. The only resource, then, is to this court. They have no authority to interfere till this application is made to confirm, and then, the matter being before them, they may proceed on the objections taken. The report was returned on the last day of the last term, and from the manner in which the corporation have taken their rule, they seem to suppose it might now be opposed by showing cause. There can be no ground, therefore, for imputing *laches*, as the company have come forward at the earliest period they could, after the court was in possession of the cause by filing the report. But it is contended that the notice, though defective, was enough to put the Company on inquiry, and they ought to have applied to this court directly after service of the petition. The rule of practice in this court, as to defective notices, does not apply to this case. It is a special mode of proceeding under a particular act, and therefore,

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not within our regulations as to defaults. The court are of opinion that the report be set aside.

KENT, J. I dissent from this determination. The fact is, that the bank had notice of the petition, and of the allegations of that petition. The denial of notice goes only as to time and place. The first intimation they received was on the 6th of July, and the warrant was not issued till the 12th. *They then again, on the 26th, received a further notice, and it is not till the 28th of November that the report is made. The bank remained inactive, seeing the whole business progress, and, had its termination been favorable, they would have abided by the event; as they deem it otherwise, they now come to us. It is a rule of moral justice, that no man shall be permitted to speculate on his own delay. It is against all rules of practice, which require due diligence. If a party has a short notice of trial, it is enough to set him on inquiry; and if he does not immediately come forward at the next term, we never set aside the verdict he has permitted to go against him. *McEvers v. Macklan and Gelston*, January term, 1800. The bank might have applied in the last term either to a judge or the court.

Report set aside.

THE PEOPLE *against* THE JUDGES OF THE COURT OF COMMON PLEAS IN AND FOR THE COUNTY OF WASHINGTON.

Mandamus lies to the court of *common pleas* for not signing a bill of exceptions.

RUSSEL moved for a peremptory *mandamus*(a) to be di-

(a) As to affidavit for *Haight v. Turner*, 2 Johns. Rep. 371. When rule to show cause only. *People v. Judges of Cayuga*, 2 Johns. Cas. 68. When to forbid judgment. *People v. Sessions of Chenango*, 1 Johns. Cas. 179

 People v. Judges of Washington.

rected to the judges of the *common pleas* for the county of Washington, ordering them to sign a bill of exceptions.

Per Curiam. Take your rule to show cause the first day of next term.[1] The practice is, not to grant a peremptory *mandamus* in the first instance.(a)

Rule to show cause granted.

S. C. with opinion of Kent, J., 2 Caines' Cas. in Error, 319. When to compel judgment. *Fish v. Weatherwax*, 2 Johns. Cas. 215. *Haight v. Turner*, *ubi sup.* When not. *Jansen v. Judges of Ulster*, Cole. 117. S. C. 2 Johns. Cas. 72. When to sign bill of exceptions, and when not. *People v. Judges of West Chester*, Cole. 135. S. C. 2 Johns. Cas. 118. *Sikes v. Ransom*, 6 Johns. Rep. 279. When to correct and compel proceedings. *The King v. Justices of Wiltshire*, 1 East, 683. and 10 East, 404. *The King v. London Court of Requests* 8 East, 292. *Rex v. Justices of Leicester*, 1 East, (n) 686. When not for allowing an account. *Adams v. Supervisors of Columbia County*, 8 Johns. Rep. 323. *The King v. Justices of Kent*, 11 East, 229. When to restore an attorney, or officer. *The People v. Justices C. B. of Delaware*, 1 Johns. Cas. 181. *The King v. Company Free Fishers, &c.*, 8 East, 353. *The King v. Commissary, &c., of Bishop of Winchester*, 8 East, 573. *Rex v. Clarke*, 2 East, 75. When to grant administration. *The King v. Inhabitants of Horsey*, 8 East, 408. When to inspect books. *The King v. Lucas*, 10 East, 235. When to give benefit of an insolvent act. *Ex parte John King*, 7 East, 91. When not to commissioners of bankrupt to certify conformity. *Ex parte John King*, 8 East, 92. When not as prospective. *The King v. Chapchoardens of Haworth*, 12 East, 556. When not as too late. *The King v. Justices of Lancashire*, 12 East, 366. When peremptory. *People v. Judges and Supervisors of Ulster*, 1 Johns. Rep. 64. *People v. Collins*, 7 Johns. Rep. 549. Form of writ. *The King v. Bishop of Oxford*, 8 East, 345.

[1] As to compelling the judge to sign a bill of exceptions see Graham's Prac. p. 327; 2 Rev. Stat. 422, sec. 75; 2 Caines, 373; 2 Johns. Cas. 118; 6 J. R. 279; 5 Wend. 132.

(a) The Reg. Brev. 182, contains a writ grounded on the stat. Edw. I, commanding the judges to put their seals *juxta formam statuti*. If they make a false return, an action lies against them. See 2 Inst. 427. Show Pa. Cas. 117.

Manhattan Co. v. Brower.

MANHATTAN COMPANY *against* BROWER.

If a person in custody on meane process sign a warrant of attorney, the nature of which is explained to him by an attorney, who does not witness it as his attorney, the court will not *at asmb.* set it aside.

THE defendant in this suit being in custody on meane process, executed a warrant of attorney to confess judgment for the amount of the debt, but it was not witnessed by any person as his attorney, acting in that capacity for him.

Hoffman, on this ground, moved to have the warrant of attorney delivered up to be cancelled, and to vacate the judgment entered.

Hamilton, contra, read some affidavits, showing that the defendant, at the time of executing the instrument, was perfectly well apprised of its nature, which had been explained *to him by an attorney, though not [*512] actually *his* attorney, or the attorney of the plaintiffs, and that the whole transaction was *bona fide*, and without surprise.

The inclination of the court appearing to be against the application, the proceedings having been within the spirit of the rule relied on; and it being suggested at the bar, that it was doubtful whether the English rules of E. 15 Car. II. and E. 4 Geo. II. had ever been made rules of this court, though the practice was acknowledged to have been in conformity to their regulations,(a)

Hoffman consented to withdraw his motion, and let the

(a) In all cases not provided for by the rules of the supreme court, the practice of the K. B. is said to be adopted. *Dubois v. Philips*, 5 Johns. Rep. 235

 Ross v. Hubble.

judgment stand as a security for the debt, the plaintiffs delivering a declaration, and agreeing to go to trial on the merits.(a)

Motion withdrawn.

ROSS AND OTHERS *against* HUBBLE, AND JEMIMA, his wife, administratrix of PATERSON.

Where it is necessary only to endorse an appearance on the writ, bail not being required, it is the duty of the clerk of the court to enter the appearance of record. If judgment be signed before it is so entered, it is good, and the court will order the appearance to be entered *nunc pro tunc*.

THIS was a motion to set aside the default entered in the cause, and all subsequent proceedings, with costs.

The affidavits contained a variety of unimportant facts, but the only question worth noticing, which was relied on, was one of practice, whether it was regular to a writ, which was in trespass only, and returned(b) with the names of the defendants endorsed, to enter their appearance in the clerk's office, after judgment was signed.

It was contended that as the court would order it to be done on application, it was in fact, doing no more than that which the court would sanction.

Per Curiam. It is said that no appearance of the defendants, by special or common bail, or an entry of an appear-

(a) In *Hutson v. Hutson*, 7 D. & E. 8, court of K. B. held, that the benefit of the English rule referred to, could not be waived by a prisoner, and that the presence of the plaintiff's attorney was insufficient, though acting for the prisoner at his request and entreaty, and though pressed to send for another attorney, to witness the instrument, with the nature of which the defendant was perfectly acquainted.

(b) If the writ be not returned, nor bail filed, nor an appearance entered, it is irregular to enter a rule for pleading, because the court is not possessed of the cause; the rule, and proceedings on it will, therefore, be set aside. *Howell v. Denniston*, 3 Caines' Rep. 96.

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ance was of record, when the default and judgment were returned. As the process in the cause did not require bail, the defendants endorsed their appearance on the *capias*. It was the business of the clerk, and not of the attorney, to have *entered their appearance. This [*513] may be done *nunc pro tunc*. The *laches* of the clerk ought never to prejudice the attorney.[1] We, therefore, deny the motion with costs of opposing.

Motion denied, with costs.

 WATERBURY and another *against* DELAFIELD.

Where a suit has been consolidated, and a commission sued out in the consolidated cause, in which the defendant had joined, the court will allow the evidence taken under it to be read on the trial of the principal suit.

THIS was the principal suit in several actions on a policy of insurance, in which a consolidation rule had been granted. A commission to examine had been taken out, titled in the consolidated cause; in the commission the defendant joined, and titled his cross interrogatories in the same manner.

Hoffman moved to read, in the principal cause, the evidence taken under the commission, titled in that which had been consolidated. The Court, after some words by *Pendleton*, in opposition, granted the motion with costs to abide the event of the suit.

Motion granted.

[1] On this point see also *Hester v. Haynes*, 6 Wend 147.

In the matter of Randall.—Gordon v. Bowne.

IN THE MATTER OF RANDALL, an absent debtor.

If the trustees of an absent debtor's estate admit there will be a surplus after payment of all demands, the court will, on petition, order a part to be paid to the debtor, or his agent.

THE attorney of the debtor, who was still abroad, applied to have the sum of five thousand five hundred dollars paid to them by the trustees of the creditors, on a petition stating, that after payment of all demands then established, and keeping in hand a sufficient sum to answer any which might appear, there would remain, of the money, now in the Manhattan bank, to the credit of the debtor's estate, a very large surplus.

These facts being admitted by the trustees, the Court ordered according to the prayer of the petition.

GORDON, survivor of MUNRO and GORDON, against BOWNE.

Where a plaintiff has neglected to file a *capias* and enter an appearance for two terms, though there be an affidavit swearing to an agreement that all the proceedings should be considered as of a third term antecedent, the court will not give leave to file the *capias* and enter the appearance *nunc pro tunc* as of the third term past, especially if it appear that it be asked with a view to prevent a set-off of a note falling due since the third, and before the second term, but will order the *capias*, &c. to be as of the second term past. Endorsing an appearance on a writ of a term past, is not evidence of an agreement that the proceedings shall be considered as of that term.

THIS was an application for leave to file the *capias*, and enter the defendant's appearance *nunc pro tunc*, as of the last August term.

The facts, as they appeared on the several and long affidavits read, were, that the plaintiff and his partner were the assured on a policy of insurance, underwritten by the defendant; that being in embarrassed circumstances,

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and unable to meet *their payments, they entered [514] into a composition with their creditors, of whom the defendant was one, to pay them, on receiving a release from all demands, fifteen shillings in the pound; ten shillings to be paid by approved endorsed notes, and the remaining five shillings by their own; the endorsers to receive an assignment of a part of the property of the plaintiff and his partner, by way of security against their endorsements; that, in pursuance of this agreement, the defendant received his two notes of ten shillings, and five shillings in the pound, executed a release, and the policy in question was assigned to persons for whose benefit the present action was brought; that the note for ten shillings in the pound was duly paid by the assignees of the policy. The attorney for the plaintiff called on the defendant, a few days before August term, to inform him of the intended suit, when the defendant assured the attorney, that the matter would be accommodated, and, if not, that he would consent to proceedings being as of August term; that a *capias* was afterwards sued out on the second of August last, returnable the sixth, but not served till after August term, at which time the defendant endorsed his appearance, and, as the plaintiff's attorney verily believed, with intent, that all proceedings should be deemed as of August term; that the declaration was titled as of August term, though the *capias* has not yet been filed; that since August, the plaintiff has become a bankrupt, and that the defendant had pleaded, giving a notice of setting off a note which fell due on the 8th of September last, and was the very note for five shillings in the pound given by the plaintiff and his partner, in composition for their debts.

Hoffman insisted that the endorsement of the writ by the defendant, was tantamount to a written agreement, as it was evidence in writing of the agreement, which was further corroborated by the pleadings.

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SPENCER, J. delivered the judgment of the court. The defendant resists the application, relying principally on this; that he holds, to nearly the amount of the plaintiff's demand, a note against him due on the 8th of [*515] September *last, which he intends to set off. The object of the plaintiff's motion is, if possible, to exclude this effect; on this ground, that his demand is assigned for the benefit of certain persons who have paid debts for him, incurred by endorsements to his compounding creditors. The defendant denies notice of such assignment; both parties admit the insolvency of the plaintiff. The verbal agreement between the attorney for the plaintiff and the defendant cannot be attended to; a rule of this court forbids such agreement being alleged.

There has been *laches* on the part of the plaintiff, in not entertaining his suit as of August term, and to avoid that *laches*, the court is now applied to. In granting favors of this kind, the court ought to be careful not to do injustice, and it appears to them, that granting the rule as applied for, might have that effect; for, most certainly, the defendant's claim to offset is better founded than that of the assignees to recover. Let a rule be entered, that the plaintiff have leave to file his writ, and enter the defendant's appearance, as of the last term.

THOMPSON, J. I am sorry to be under the necessity of differing from the court; but I think the endorsement of appearance is evidence of an agreement as strong as if it had been reduced to writing, and sufficiently indicative of the intent of the parties, to avoid any of the consequences, against which the rule in question was framed. How far the defendant may, by filing the *capias*, and entering an appearance of August term, be precluded from a set-off, or by the present rule entitled to it, is unnecessary to determine. My opinion is, that the plaintiff ought to have the effect of his motion.

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KENT, J. I concur in the opinion last given. I deem it a point of moral rectitude to enforce all agreements, when the evidence is such as is not contravened by any rule of law. But as the judgment of the court is, to deny the full extent of the plaintiff's application, he can take no more than has already been pronounced.^(a)

Rule to file the writ, and enter the appearance as of last term.

*MASTERS against EDWARDS.

[*516]

If a defendant be discharged for want of being duly charged in execution, he can never be taken on a *ca. sa.* issued on the judgment in the suit on which he was in custody.

THE defendant had been surrendered in exoneration of his bail, final judgment obtained against him, and after three months, he was, on regular notice to the plaintiff, superseded, for want of being charged in execution in due time. Notwithstanding this, the plaintiff's attorney sued out an execution against the body of the defendant, upon the judgment on which he had been in custody, and took him upon the *ca. sa.* thus issued.

Henry, on these facts, disclosed by affidavit, moved that he should be discharged.

This case, he said, is to be distinguished from that of Brantingham; in that, the court held the plaintiff entitled, after notice of a rule for a *supersedeas*, to come in, charge in execution, and show that circumstance as a cause for refusing the application. *Blandford v. Foote*, Cowp. 72, recognizes the principle of the application. The court there decided that a man released for want of being charged in execution, *might* be taken on a *ca. sa.* in an action founded

(a) See *Palmer v. Berrian*, 3 Caines' Rep. 131, and note there.

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on the judgment in the original suit. It is to be inferred, therefore, that on an execution sued out in the original suit, he could *not* be taken.

Benson and Riggs, contra. The English courts proceed on his maxim, "once supersedeable, and ever supersedeable." This we have departed from, and overruled, in *Brantingham's Case*. Besides, the whole object of the motion is to prevent us from doing that directly, which they allow we can accomplish circuitously; for they say we must proceed by action on the judgment, and have execution in the second suit. This is contrary to the settled principle, that circuitry and multiplicity of actions are abhorred in the law.

Henry, in reply. The doctrine contended for by the plaintiff, would go to shut out, from a defendant, any right of set-off. Suppose a man discharged; in the course of fair dealing, he, by services, or other means, pays a part of the debt; if he is to be taken on the original judgment, he is excluded from showing perhaps a full satisfaction, till he applies to the court for relief, and during that period is deprived of his liberty.

Per Curiam. In *Brantingham's Case* we certainly did depart from the English practice. We there allowed, on a rule to show cause, the being charged in execution subsequent *to notice of the application, to be shown as a reason for denying the *supersedeas*. The court proceeded there on the idea, that the statute gave the plaintiff a right of election to have execution against the body, or the goods; and that he was not obliged to manifest this election till called on.[1] The present case is not of that description; that statute was only to prevent double executions. The plaintiff has elected to relinquish the person of his debtor, who, having been once actually superseded, must continue so, and the plaintiff

[1] See *Manhattan Co. v. Smith*, *ante* p. 67.

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shall never have liberty again to resort to his first judgment. Let the defendant, therefore, be discharged, but without costs.

Motion granted, without costs

COLES, TITFORD AND BROOKS *against* THOMSON.

Practice as to commissions.

BOYD moved for judgment, as in case of nonsuit, for not going to trial, on an affidavit, that the cause was at issue in September, 1802, noticed for trial in November following, and had not since been noticed.

An affidavit *contra* was read on the part of the plaintiff, stating, that on the 9th of last March a commission issued to London to examine witnesses on his behalf, which had not been returned, but was daily expected.

Per Curiam. In the case of *Juhel v. The United Insurance Company*, October term, 1801, we held, that three months was a sufficient time (*ante*, 503, n. (a)) for executing and returning a commission *arrived* in London. In *Miller and Graham v. De Peyster and Charlton*, January term, 1803, it was decided, that where a plaintiff has delayed his own cause by a commission, and it does not appear that due diligence has been used, the defendant may apply for a rule for nonsuit, and compel the plaintiff to stipulate, (see *ante*, 7, n. (a)) or be nonsuited, as if no commission had issued. In the present case it does not appear that the plaintiff has used due diligence in causing his commission to be executed, as eight months elapsed between suing it out and the sittings. Unless, therefore, he stipulate, the motion must be granted.[1]

Motion granted, *nisi*.

[1] See *Thomson v. N. Y. Ins. Co.*, *ante*, p. 4, note [1].

Bowne v. Hallet.—Shuter v. Hallet

BOWNE *against* HALLET

If judgment be signed for the whole penalty of a bond not due, but forfeited for non-payment of interest, execution will be stayed on bringing in interest and costs, the judgment standing as security.

JUDGMENT had been signed for the whole penalty of *a very large bond on account of the breach of condition in non-payment of the interest. On motion of *Boyd*, for the defendant, the court ordered that execution stay, on payment of interest, and costs, the judgment, however, to stand as a security for the debt.(a)

SHUTER *against* HALLET.

After verdict, and certificate of probable cause granted, the court will not order the amount of the sum recovered, to be brought into court.

A VERDICT had been obtained, in this cause, against the defendant, on which a case had been made, and a judge's certificate of probable cause duly granted.

D. A. Ogden, on an affidavit by the plaintiff, stating his fear of losing his debt, from the circumstances of the defendant, moved to have the amount recovered brought into court.

Pendleton, contra, cited *Hallet v. Cotton*, ante, p. 11, in May term last.

Per Curiam. The practice of the court has never been according to the application. It would be often oppressive,

(a) See Black. Rep. 706, *Marsen v. Touchet*, S. P

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and amount to a denial of right, as the defendant may not be able to comply with the condition, yet have a complete defence to the suit.

Motion denied.

THE PEOPLE *against* FREER. (See *ante*, p. 485.)

The intent of a publication will not justify it, if it be, in the opinion of the court, contempt against the court.

THE defendant being brought into court, KENT, J., thus delivered their opinion.

The defendant is brought before the court, for publishing paragraphs in the *Ulster Gazette*, of August last, containing remarks on the trial of Harry Croswell. The paper being laid before the court at the last August term, it appeared to be intended to prejudice and influence the public mind against the court, before which the trial was held, and to intimidate and influence this court in deciding on the motion pending before it, for a new trial in the cause. A rule was accordingly granted, that the defendant show cause, by the ensuing term, why an attachment should not issue against him for a contempt.

This proceeding was correct and necessary. Publications scandalizing the court, or intending unduly to influence, or overawe their deliberations, are contempts which they are *authorized to punish by [*519] attachment; and, indeed, it is essential to their dignity of character, their utility and independence, that they should possess and exercise this authority. The defendant did not show cause in person, in pursuance of the rule, but he appeared by attorney, and in an affidavit disavowed any intentional disrespect to the court, or any intent that was contemptuous and unlawful. He stated, that the offensive remarks were produced in the course of an

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editorial controversy on the subject of Croswell's trial, with another newspaper, entitled the Plebeian. The court considered this affidavit as not going in justification, but only in excuse of the publication; and that, on such occasions, the defendant ought to appear in proper person, and answer. Accordingly, the rule for an attachment was made absolute. He is now brought in upon attachment, and admits himself the publisher of the remarks in question, and again clears himself by oath of all intentional disrespect or contempt. We have no reason to doubt the truth of the defendant's affidavit, which exculpates him from any criminal design, and we have nothing to do, under the present process, with the seditious or libellous nature of the publications, any farther than they relate to a charge of contempt against this court. The defendant's excuse is entitled to its full consideration. On the one hand, we cannot but perceive that the disavowal of any bad intent will not do away with the pernicious tendency or effect of publications(a) reflecting on judicial proceedings which are before us. On the other hand, when the causes which led to the publication are frankly stated, and that the discussion originated in an opposite and rival paper; when we consider the irritation which these publications must have produced, and the unguarded license with which all questions of general concern have been usually treated in our public prints, we think the present case, under all its circumstances, does not require any serious animadversions. When a case is made out, in which there appears sufficient evidence of an intentional contempt, we should deem it our indispensable duty to inflict a punishment strong and exemplary. But, we trust, the notice we take of [*520] the present case will *answer all the ends of justice, by serving as a sufficient warning to the defendant and others, not to presume to use language which must be understood as reflecting upon, or threatening the court in respect to questions then under investigation.

(a) Therefore a good intent would not be a justification, *at least*.

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The judgment of the court, therefore, is, that the defendant pay a fine of ten dollars, and stand committed till it be paid.

B. M. MUMFORD and G. S. MUMFORD *against* SMITH.

If the facts given in evidence manifestly show a want of seaworthiness, and a jury find against them, the court will set aside the verdict, notwithstanding the jury, at the time of giving it in, declare they have rented their decision upon the whole matter in evidence.

THIS was an action on a policy of assurance on the cargo of the Sloop Mary, consisting of flour and corn, valued at 6,720 dollars, of which 3,220 dollars were underwritten by the defendant, at a premium of 9 per cent. from New York to Kingston, in the island of Jamaica. The claim was for a total loss by the perils of the sea.

On the trial, which was before Mr. Justice *Radcliff*, on the 23d of November, 1803, at the sittings in New York, it appeared from the evidence, that the following were the circumstances of the case :

The Mary was constructed in 1795, of oak of the best quality, and faithfully built in every particular. When off the stocks, she was first employed as a packet between New London and New York. After this, she made several voyages to the southward and the West India. In 1798 she was raised, not on account of any decay, but to render her more burdensome. At this time she appeared stout and strong. New top timbers were put in. Some of her beams, and other pieces of her timbers were of good chesnut. Her plank all of white oak, except her decks. In 1800 she was graved and caulked. She then appeared sound, strong and tight; so much so, in the opinion of one witness, that he offered for her 2,000 dollars. She sailed on the voyage insured, but was leaky from the time of

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leaving Sandy Hook. On the 11th of August, 1800, she met with heavy gales and severe weather, in consequence of which she suffered much injury and was rendered very leaky, making so much water that it was with difficulty she could be kept free. This compelled her to bear [*521] *away to the nearest port to refit, and on the 15th of the same month she put into Hamilton, in the island of Bermuda. After unloading the cargo a survey was had upon her. She was bored by the surveyors in several places, and adjudged seaworthy; they even declared they had scarcely ever examined a tighter or stauncher vessel. Upon a report being made to this effect, her repairs were commenced. In the course of their prosecution one of the caulkers struck his iron into a plank on the starboard quarter and found it so rotten as to be unable to hold oakum. This induced a further examination round that spot, when four or five other timbers were discovered to be considerably decayed. Two others also, on the larboard quarter, appeared somewhat unsound. But those amidships, on both sides, were perfectly good. On this the captain procured a second survey to be held, when the same surveyors, after investigating her quarters, immediately pronounced her unfit for sea, observing that her starboard quarter alone was sufficient to condemn her. No other parts, except her quarters, were examined; and, according to the mate's testimony, (on which, as to the situation of the vessel in Bermuda, the preceding facts were disclosed,) she might have been refitted without much expense. He added, that he would have been willing, after very little repairs, to have sailed in her to any part of the world. In sails, &c. she was well found.

The survey itself, dated the 2d of September, 1800, stated that a plank being taken off on both sides of the sloop's waist, not one top timber was sound; on the contrary, they were generally rotten that she could not have been made fit for sea, without renewing the whole of her sides, above the wales; that this would have been attended

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with a very heavy expense, and perhaps as much as she would sell for when done; that the other parts of her hull appeared sound. Nor was there any fault in her masts or spars; yet her sails and rigging were indifferent, having been much worn.

The surveyors, who were admitted to be men of character, when examined under a commission issued for that purpose, *confirmed the facts contained in [*522] the report, and they were further corroborated by the agent of the vessel.

It was acknowledged that the Mary, previous to her sailing, had, in March, 1800, been hove down to get at her keel, but her upper works were not then examined, nor were her timbers bored. At that time one witness had offered 2,000 dollars for her, considering her staunch and tight. After the survey she sold for only 84 pounds 10 shillings, and was purchased by one of the surveyors, who however, never put her into service, but broke her up as not worth repairing.

It appeared that in 1800 there was but little intercourse between Bermuda and Kingston. During the summer of that year, no neutral vessel could have been procured to go from thence to Jamaica. British bottoms might have been had at an enormous freight, and insurance was also immensely high. Workmen, too, were difficult to be obtained.

It was admitted the cargo did not sustain a damage amounting to an average, the injury being less than 5 per cent.

On the trial the counsel for the defendant insisted the plaintiff was not entitled to recover for these reasons:

- 1st. That the vessel was not seaworthy.
- 2d. That if seaworthy and reparable at less than half her value, she ought to have been repaired, and have prosecuted her voyage.
- 3d. That if irreparable, another vessel should have been procured, and the cargo taken to the port of destination.

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4th. That the damage was less than an average.

The judge charged, that if the witnesses examined at Bermuda, and the witnesses examined on the part of the defendant in New York, were to be believed, (and their characters were admitted to be respectable,) the verdict should be for the plaintiffs for the *premium* only, on account of the unseaworthiness of the vessel. That if the damage sustained by the vessel, during the voyage, was repairable at less than half her value, the master should have repaired her, and proceeded to Kingston with the cargo, and on this ground the verdict should be for the defendant, there being no average.

That, upon the first point, the weight of evidence was *with the defendant, if the testimony taken under the commission and here on his part, was to be credited. That on the second point, he was strongly inclined to think the evidence in favor of the defendant.

Upon this the jury found a verdict for the plaintiffs for a total loss, and gave the following reasons :

1st. That they considered the vessel seaworthy.

2d. That it would have cost more than half the value of the vessel to have repaired her at Bermuda, taking into view her whole condition ; but as to the *quantum* of injury sustained by the perils of the sea separately, they give no opinion, resting their verdict upon the whole matter.

These explanations making, by agreement, a part of the case, a motion was made to set aside the verdict, as contrary to evidence.

The same points, made by the defendant at the time of trial, were now again insisted on ; but as the decision of the court went totally on the weight of evidence as to seaworthiness, it is unnecessary to do more than state the decision itself, which was delivered by

LIVINGSTON, J. It is conceded that the right to recover cannot exist, unless the vessel, at the time of sailing on the

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voyage insured, was seaworthy ; that her not being so will affect as well an innocent shipper of goods as the owner of the vessel. This is certainly so, and however hard the law may bear on persons of this description, the underwriter is entitled to the full benefit of it, and ought not to be held to payment when this implied warranty has been violated. Whether such has been the case is principally a question of fact, and we would not willingly disturb a verdict given against an assurer of goods on a defence of this kind, where there had been a contrariety of testimony, or where the proofs were nearly *in equilibrio* ; perhaps not, unless their decision was most manifestly against the whole of the evidence : such we think is the case here.[1] No one who reads the testimony can hesitate in saying that the breaking up of this voyage was not occasioned by any one of the perils insured against. The Mary must, then, either not have been seaworthy when she left New-York, or so far decayed as to require *repairs at an intermediate stage of the voyage, which it was either impracticable to give her, or which would have cost more than she would, when repaired, have sold for. In either case the defendants are not liable. The mate does not state particularly what injury she received from the gales she encountered, except that of making more water, for she leaked when she left the Hook ; this induced the master to bear away. On her arrival at Bermuda, she is thoroughly examined and found to be in a most decayed state. This rottenness in her timbers, it is certain, could not have taken place in so short a voyage, but must have existed when she left New-York. If we give no credit to surveys(a) of this kind, which, besides being *ex parte*, are too easily, and

[1] See ante, p. 25, note (a).

(a) As they are, in general, mere reports of the state of the vessel, not given under the solemnity of an oath, and *ex parte*, Lord Kenyon ruled they were not evidence of any thing but the fact of condemnation; *Wright v. Barnard*, 2 Esp. Rep. 700, and in *The Mar. Ins. Co. v. Wilson*, 3 Cranch, 187, their conclusiveness on the state of the vessel seems doubted.

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sometimes fraudulently, procured, we *must* believe the surveyors when examined under our own commission. They bear the character of respectable men, and the abandoned state of the vessel after her condemnation and purchase, is a great proof that they acted with integrity and good faith. Nothing to the contrary should be inferred from one of them becoming a purchaser. This he could not foresee would be the case in a sale at auction, and at any rate it does not appear that he made much by the bargain. The agent is also a strong witness on the same side. To all this nothing is opposed but an opinion of the mate, that she might have been repaired, and proof that the *Mary* was well built, and *once* a strong vessel. A carpenter repaired her previous to her sailing on her last voyage, but did not examine her upper works, or bore her timbers. Now all this may be true, and yet it does not, in any degree, derogate from the credit due to the witnesses who last examined her; who were in a situation to form a correct opinion, and who pursued the best and only means of coming at an accurate conclusion. It must always be difficult to determine, with certainty, what portion of the injury is occasioned by latent defects, and what by perils of the sea; but here it is sufficient to say, that the injuries which required repairing at Bermuda, and produced a termination of the voyage there, could not have arisen from any accident insured against, because it is expressly stated, by the witnesses, that these repairs were rendered necessary by the imperfect condition ^{*}of the timbers; not by her leaky condition, which was the only effect of the weather she met with. If no further defect had been discovered but a leak, this could have been repaired, and the vessel would soon have pursued her route. Our opinion is, that this is a verdict palpably against evidence, which established, beyond doubt, the innavigability of the vessel, and that a new trial must, therefore, be had, on the payment of costs by the defendant. It is or

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course unnecessary to decide the other point made in this cause.(a)

New trial.

BROWN and KIMBERLY *against* NEILSON and BUNKER.

In judging whether a vessel has been lost in a voyage insured, the usual and not the utmost length of such a voyage, is the period on which the jury is to proceed. If two storms are given in evidence on a policy for time, the one within and the other without the period, it is for the jury to say in which the loss has happened. An insurance made on freight and cargo after a previous knowledge of a second storm, does not conclude a jury from finding that the vessel was lost in a prior storm.

THIS was an action, brought after March, 1802, on a policy of insurance for four calendar months, commencing the 28th day of November, 1800, and expiring the 28th of March, 1801, upon the body of the schooner Almira.

The declaration averred the loss to be by perils of the sea, previous to the termination of the limited period.

The vessel sailed from Norfolk, in Virginia, on the 4th of March, 1801, bound to New York, and to prove the loss within the time, the plaintiffs offered evidence to show that a violent storm had taken place the day after her departure, in which, they contended, she had perished. To this the counsel for the defendants objected; but, on its being overruled, the plaintiffs substantiated the fact, and by the same witnesses it appeared, that vessels who sailed with the Almira, arrived in about ten or twelve days, though, that she herself could hardly, with a head wind, have arrived so soon.

The usual passage from Norfolk to New York was established to be from five to six or seven days; one witness, a master of a vessel, swore he never knew of an instance above 14 days; from the testimony of two other persons it

(a) See *Dow v. Smith*, ante, 34.

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appeared, that there had been one instance of a safe arrival after being 30 days out, and another after 60. On the defendant's part, the existence of a severe tempest, all along the New York coast, on the 29th of March, the day after the termination of the policy, was proved. They offered, also, evidence that the assured, when fully apprized of the first storm, effected, on the 14th of March, a policy on the cargo at 4 *per cent*, and another on the 18th, upon the freight at 18 *per cent*. This, however, the court refused to admit.

Upon these facts, the judge charged, that there was not any time fixed by law after which a missing vessel shall be presumed to be lost; that if the jury thought the vessel was probably lost within the time limited by the policy, they ought, in his opinion, to find for the plaintiffs; that he thought the rule ought to be, if a vessel did not arrive within the usual limits of the voyage she was prosecuting, (a) she ought to be presumed to be lost, and that it would not be reasonable to calculate on the utmost, or greatest limit of it; that they ought to decide, according to their judgment of the greater probability of her being lost in the first storm, or in the last.

On this the jury found for the plaintiffs, and said, they had calculated interest from the 5th of March.

A certificate of probable cause for a stay of proceedings having been obtained by the defendants, a case was made on their part, in which the following points were raised :

(a) The time at which a presumption of loss, from a vessel's not being heard of, shall arise, is not precisely established. Each case must depend on the nature of the voyage and distance of the *termini*. *Gordon v. Brown*, 2 Johns. Rep. 150. It is not necessary for the establishing such an inferential claim, to show by witnesses, that the vessel did not arrive at her port of destination. It is sufficient to prove that she has not been heard of in the country from whence she sailed and where insured. *Toemles v. Owen*, 2 Campb. 85. *Green v. Brown*, 2 Stra. 1190. *Newby v. Read, Park*, 6th C. 85. But it must be made to appear that when she left the port of outfit she sailed on the voyage insured. *Cohen v. Hinckley*, 2 Campb. 51.

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1st. That the judge was mistaken in stating the rule of law, as to the presumption of loss from missing vessels.

2d. That the facts proved were not sufficient to enable the jury to find the loss to have been within the time for which the Almira was insured.

3d. That the insurances made by the plaintiffs on the freight and cargo of the same vessel, *after* they were apprized of those facts, showed they did not themselves consider them as sufficient to warrant the presumption of loss from the storm on the 5th of March, and the evidence of it ought to have been admitted for that purpose.

On the case being opened, *The Court* thought there was no ground for staying proceedings, and ordered judgment for the plaintiffs according to the verdict.

Judgment for the plaintiffs.

CODWISE, Jun. LUDLOW and CODWISE, *against* HACKER.

If a master of a ship be guilty of a breach of orders, by pursuing voyages contrary to his instructions, and invest the proceeds of his freight in articles which his owners take to, this, if accompanied with a declaration that they find no fault with him but for not writing, will be a waiver of any right to sue for damages, on account of disobedience. The acts of a principal are to be liberally construed in favor of an adoption of the acts of an agent.

THIS was an action on the case for disobedience of orders.

*The plaintiffs were owners of a ship called the [*527] Young Eagle, of which they had given the command to the defendant, on a voyage from New York to Martinique, from thence to New Orleans, and in case no freight should offer at the latter place for New York, then to proceed to the Havanna, and from that port home.

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In Martinique, the defendant was addressed to Messrs Ranci & Co. with injunctions to consult them in what manner to best promote the interest of the voyage, and to let their opinions have due weight. The letter of instructions, in addition to this, contained the following passages: "It is our desire that you strictly adhere to the following instructions, which are to be considered as binding on you, and not to be deviated from. From Martinique you are to proceed with all possible despatch to New Orleans, and there value yourself on Mr. James Carrick, to whom the ship is addressed there, and to whom you have letters, and then use your interest and address to procure a full freight home to New-York. Should there unfortunately be many vessels there, loading for New-York, you must then try whether, offering to take freight on more reasonable and lower terms than the other vessels, would not be the means of procuring you a full freight in preference to them. If so, it is our orders that you take freight at under rate, in preference to returning home in ballast. Although the ship is consigned at New Orleans, you are nevertheless to advise in all matters relative to our interest with the consignee. You must pay particular attention to see whether our consignee attends to our interest in his exertions to get the ship a freight, and if not, you will of course see the necessity of your redoubling your exertions to procure freight, and not to place your dependence on the consignee; you will, therefore, pay strict attention to the foregoing request, as our chief dependence is placed on your exertions. Further, as a last resort, in case you can procure no freight for the United States, you may then take freight for the Havanna, and from thence to New-York, provided you have one that offers that will answer. You will consult in the Havanna, with Santa Maria Cuesta & Co. Finally, [*528] if after obtaining the best *information whether freight can be procured or not, and giving the ship a fair chance, by waiting two or three weeks, if none offers, you'll then return back to this port, with all possible de

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spatch. It is our orders that you take freight at under rate, in preference to returning home in ballast, or if a full freight was to offer for Philadelphia, or Boston, or any port in the United States, you might take it."

The vessel sailed from New-York, arrived at Martinique, and, departing from thence, reached New Orleans safely on the 2d of October, 1799. Whether any freight then offered for New-York was not shown. But the defendant procured one for the Havanna, to the amount of 5,225 dollars, with which he sailed in 30 days after his arrival. On the passage, and within six hours' sail of his port, the defendant wrote, by a brig he met, a letter to the plaintiffs, saying, that if he could get permission, he should go from the Havanna to Campeachy. Having safely reached the Havanna, the defendant received payment of his freight, partly in cash, and partly in a bill on R. Rolf, of New Orleans. With the cash he purchased sugar, which he shipped to his owners in a vessel named the Ohio, and having delivered his cargo, weighed anchor on the 29th of December, 1799, for New Orleans, where he arrived after a tempestuous voyage of 40 days. He there received, on the 8th or 9th of February, 1800, a letter from his owners, dated 2d of January, 1800, ordering him by no means to go to any Spanish port, but rather to return in ballast to New-York. In a subsequent one, directed to the Havanna, dated the 29th January, 1800, and written on the very day of receiving an account current from Santa Maria Cuesta & Co. charging them with 50 boxes of sugar, paid on account of the freight of 5,225 dollars, the plaintiffs blame the defendant for not writing by every opportunity; and request him immediately to return to any port in the United States, alleging as a reason, that the rate of insurance on vessels trading from one Spanish port to another, was so high as to run away with everything made. At the conclusion, however, of the letter, the plaintiffs add, "All the fault we find, and which is a great one, is your omission and neglect of writing us by every opportunity, and conclude

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[*529] with wishing *you speedy back." From New Orleans the defendant wrote, acknowledging the receipt of the plaintiffs' positive directions to return, but stating, at the same time, the impossibility of his immediate compliance, as he had, with the proceeds of the bill on Rolf, purchased, on account of the plaintiffs, a cargo of sugar boxes, with which it was his intention to go to the Havanna, and invest the proceeds in a cargo for New-York. In consequence of this, the defendant sailed from New Orleans to the Havanna, where, after a passage of 9 days, he arrived on the 7th of April, 1800, sold his boxes, bought with the amount of the sales a cargo of molasses, shipped them on board his own vessel, set sail for New-York, and reached the quarantine ground in the month of June, 1800.

The plaintiffs here took possession of the vessel and her cargo, which they sold on their own account.

It was admitted that the plaintiffs had insured the molasses as their own property, and had also effected policies on the vessel on her several voyages. The defendant gave in evidence, that on his first arrival at the Havanna, in December, 1799, the vessel was defective in her spars, and the witness who testified to this deposed, that he would rather not have come to the United States than have embarked in her in December. He further added, there was then no convoy for the United States from the Havanna.

It appeared, however, on the case, that in the 40 days' passage from the Havanna to New Orleans, the ship, notwithstanding the bad weather encountered, never complained in body or rigging.

The general veracity also of the defendant's witness was impeached. From the log-book it appeared, that no mention was made of any failure in the masts or rigging; that in the last voyage, much tempestuous weather was experienced off Sandy-Hook, in which water mixed with molasses was pumped up, and sometimes more molasses than water. Some loose declarations of the plaintiffs, made to particular friends of the defendant, were given in evidence, tending to

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show that the defendant had acted according to the best of his knowledge, and that he was an honest man; confessing also,* that he had taken the bill on Rolf [*530] to purchase a cargo on their account; and that, though they were dissatisfied with his not writing, they never said any thing about his disobedience of orders. The defendant, in addition to this, offered to prove that he had, in every part of his conduct, advised with the correspondents of the plaintiffs, and followed that course they sanctioned.

The counsel for the defendant contended, at the trial, 1st. That the words in the letter of instructions, "as a last resort, in case you can procure no freight for the United States, you may then take freight for the Havanna, and from thence to New York, *provided you have one that offers that will answer,*" left the defendant to exercise his discretion in the employment of the ship, in case no freight should offer for the United States.

2d. That the plaintiffs declaring themselves satisfied with the manner of employing the ship, and declaring, in writing, that the only fault they found with him was his not writing oftener, was either a waiver of any claim for deviation, or was evidence of the defendant's having discretionary power of employing the vessel, in case no freight offered at the Havanna.

3d. That the season of the year, state of the ship, the want of freight, convoy and advice of agents, formed a justification.

4th. That the insuring by the plaintiffs of the vessel and cargo from Havanna to New York, and accepting them on their arrival here, and exercising every act of ownership over them, was an adoption of the conduct of the defendant, and a complete bar to a recovery in this suit.

His honor Mr. Justice *Radcliff*, before whom the cause was tried, having overruled all these points, charged in favor of the plaintiffs, and the jury found accordingly.

On these circumstances, and on the four antecedent rea

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sions, it was moved to set aside the verdict, and grant a new trial.

Hamilton, for the defendant. It will be contended that the facts, as they appear on the case, evince an absolute breach of orders. But we rely that, even allowing [*531] they were broken *in various particulars, there has been an adoption of all the acts. If so, then they will be considered as done on account of the plaintiffs, and the defendant stands excused from answering in damages. This is evident, because in their letter to him, after full information of all that had passed, they not only do not disavow a single transaction, but go so far as to adopt them, by saying the only fault they find with him is, that he did not write. This certainly is exactly the same as saying, we are perfectly satisfied with your conduct. In conversation with individuals the same ideas were, after a full knowledge of all circumstances, in more than one instance reiterated. The expressions of discontent, which the letters of the plaintiffs contain, are all referrible to transactions previous to the last letter, and were written before the account of the shipment of sugar by the Ohio had arrived. This was received by them, and sold on their own account. Was there no other circumstance to show the plaintiffs' adoption of the defendant's acts, this would suffice; but others are presented; from which they cannot escape. Knowing all that had happened, they insure the last cargo, that of molasses, on their own account, receive it from Captain Hacker when he arrives; and sell it on their own account, without ever communicating with him in the least. All of these acts are after a full knowledge of the molasses having been purchased and shipped on their account. In commercial affairs between agent and principal, (for such the parties here really are,) the slightest assent of the principal should be construed as an adoption of his agent's acts, because it is necessary, from their situation abroad, that they should occasionally act in a latitudinary manner. If

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what is thus transacted be *bona fide*, the most trivial circumstance should be seized by this court, to say it is a ratification of all that has taken place. The court will see that this rule ought to be strictly enforced against the principal. Its being so will not in the least infringe on the rule of law which makes the agent responsible. If the principal desires to enforce it, he is at perfect liberty so to do; but if he does not take his position on the rigid letter of legal doctrine, any equivocal act ought to be deemed an assent. It is his duty to disavow by some open act. *In other countries this is invariably the [*582] case; the principal, by some judicial process before a notary, protests against his agent; and this is a sufficient proof of the disposition with which any subsequent act is done. Though our jurisprudence does not know any tribunal to have recourse to for this, yet some method ought to be pursued to show the *quo animo* of the principal in taking goods, if he does not mean to be bound. He should not lay by and wait events; if the result be favorable abide by them, if unfavorable refuse; this would be *mala fides*. But let that be how it will, the reception of the cargo by the Ohio, the insurance, and sales by the plaintiffs, are conclusive against them. Little stress can be laid on the circumstance of that cargo being the amount of their own proceeds, because, if so, it legalizes the voyage. The court will not permit any one, when an agent has acted contrary to orders, to insure the subject matter as his own, and call on the underwriters to pay when he had an intention to consider it the property of another; for it would be a fraud on the underwriters. The state of the cargo ought to be declared, or the insurance made for whomsoever it may concern; for no man can, in his contracts, have various intents on the same subject. It is no answer that the principal might, for caution, secure himself; so he may, by taking the property into possession; but he ought not to sell, for then the act of sale is decisive, if made as his own; especially when the agent is on the very spot; for he

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might then, on a disavowal of his acts, have paid them their money and taken to his goods. Either, then, the plaintiffs converted the property, or received it on their own account, and thus ratified the principles of the voyage. The court will not allow them to say they converted, because no man shall be permitted to say he is a wrongdoer, when his conduct will bear an innocent construction. For the general principles which govern in cases of adopting the acts of another, the court will find all that has been advanced fully confirmed in *Smith v. Cologan*, (a) 1 D. & E. 188. (a) Against this we are aware *Cornwall v. [533] Wilson*, *1 Vez. sen. 509, (b) may be cited; in that case, however, when the goods arrived they were disavowed; and it was from the subsequent acts that even the disavowal was controlled by acts like these, for there the goods were insured and sold by the principal. Instead of the disavowal as there, in express terms, we here find the plaintiffs acknowledging themselves contented with the defendant's general conduct, and dissatisfied only with his not writing.

Hopkins and Harris, contra. The present is a simple action by a shipowner against his captain for disobedience of orders. It is not a case between a merchant and his factor, but of a master against a servant employed to do a special act, and no more. Here the defendant was engaged

(a) This was an action by a principal against his agent for breach of orders in making insurance; one of the plaintiffs, whilst the execution of the orders was depending, had the state of affairs submitted to him, and approved of all that had been done. This approbation, with full knowledge, was held an adoption of the agents acts, and that the plaintiffs had to look to the underwriters.

(b) In that case the principal insured, but the act of insuring to the port of original destination was explicitly held not to be an adoption. Nor was it between master and owner. It was an order to a factor to buy goods on account of the defendant, who, when they arrived, reshipped them to be sold at another port. They were disavowed on account of the price at which purchased being greater by 25 pounds than that limited, and the factor saved 50 pounds on the freight. See the case.

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for a particular voyage, which the plaintiff calculated would expire at a certain time, at which period, he counted on being able to employ his vessel in another service. The case states the connection between the parties, and it is unnecessary to read it. But the facts show an original intention to deviate from instructions; for, when off the Havanna, and going into that port in obedience to his orders, he writes a letter to the plaintiffs saying he should go to Campeachy. After this, any expressions from them, evincing no thorough disapprobation, can be deemed no more than a matter of prudence to get back their vessel. Her various voyages, the facts in evidence prove, were not from a disability in her rigging to encounter this coast. The defendant was clearly a servant acting under orders; to enable, however, the plaintiffs to have recourse against him for a breach of these orders, it is said they must abandon the property about which he was ordered to act. This is really new law. For surely it is not a principle, that where an owner of property sues his agent for misfeasance respecting that property, he must abandon the property or its proceeds to entitle him to his action. Or if a bailee misuse goods bailed, must the bailor relinquish the goods before he can institute a suit? or should he take them back, is his right of action gone? We conceive, unless the law is widely mistaken, that he may take back his property, and *then have recourse to his action for [*534] damages, without trusting to the personal responsibility of the defendant for every kind of recompense. Suppose a ship and cargo to the East Indies, consigned to the captain, who grossly disobeys; on his return are the vessel and proceeds to be given up, if compensation for damages is sought? This would make it an affair of calculation, in which the loss must be balanced against the means of the defendant. The plaintiffs seem to confound original property, owned by a principal, and intrusted to orders, with orders given to acquire property by their execution; they want to set up the taking back a man's own

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from his servant, as the adoption of the acts of a factor in purchasing goods. It is said, however, that the court ought to lean in support of acts of adoption in favor of the agent, and against the principal, if the conduct be *bona fide*. However that may be is indifferent to the present question, which is simply *assumpsit*, charging no fraud, but a mere breach of duty in not performing the orders he undertook to obey. For doing which he shows no kind of excuse; and as every misfeasance is, in presumption of law, *mala fide*, some justification ought to appear. No argument of approbation can be drawn from a few concluding words in one of the letters. The whole tenor of the correspondence, on the part of the plaintiffs, shows dissatisfaction, and not only repeated complaints of his disobedience, but continued injunctions to obey the orders given him. When it is considered that the defendant was abroad with the property of the plaintiffs, and that property so easily moved from place to place, the court will see the necessity and caution that the plaintiffs were obliged to use, in concealing their intention from a man who was violating every direction he received. This will easily account for all those expressions, either in writing or conversing, which seem to imply no blame. The insurance was rightly made, because the plaintiffs did no more than insure their own, and, of course, taking back their own cannot waive any cause of action which they had for disobedience of orders. On this very point the court will see the case from *Vezey* directly in favor of the plaintiffs; and that every insurance [*585] is for the benefit *of all whom it may concern, the face of every policy shows. In the citation from *Durnford & East*, there was an express approbation; so that, taking the present case every way, it makes against the defendant. This is an action for breach of orders. Those orders the case states explicitly, nor do they admit of any deviation. Even the advice of the correspondents of the plaintiffs can be no excuse, for they were to be consulted only on the manner of carrying the orders into

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effect, not whether they were to be totally laid aside; for, with respect to one, the defendant was absolutely put on his guard, and cautioned. But the formality of this sanction cannot be pretended, for the letter of the defendant, written off the Havanna, declares an avowed plan of disobedience. Of this, at the time of the conversations and letter relied on, the plaintiffs were ignorant. They, therefore, could never have approved what they did not know. Besides, they took place with third persons, and can therefore never be applied to a ratification of what passed with another. The doctrine contended for is this, that if a captain of a vessel employ her, contrary to all the orders of his owners, and defeat every plan they and arranged, yet if they take what has been purchased with the earnings of their own property, the captain is exonerated from all responsibility for the misuse of it. The fact is, the owners take back no more than their own; and at the utmost it can go only in mitigation of damages. Suppose a cargo went to be sold at a certain price, and the consignee sells at an under rate, if the proceeds be received, shall the party be prevented from recovering the excess which it might be shown could have been gotten; should the court sanction the reasoning on the other side, a master of a vessel may go on from voyage to voyage, employ himself for ten years, and if his owners should take back their own vessel and her freight, he not only ceases to be responsible for a breach of orders, but his acts are adopted, and he, of course, becomes entitled to wages for the whole time. The result of such a position must be ruinous to all commerce, and it is not to be supported by any authority whatever. In 13 Vin. 6, 7, 8, the court will see that accepting an article purchased, or the proceeds of one sold, is not always a release of damages arising from disobedience of orders.

**Hamilton*, in reply. The defendant was more [*533] than a mere master sailing according to his letter of instructions. He had a general discretionary power over

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the vessel, and was, in various situations, to act as he thought fit. The question, then, does not resolve itself into a strict compliance with orders, but whether there has been a *bona fides*, in which case, there is always a great allowance made. It was offered at the trial to be proved that every step taken by the defendant was with the concurrence of the plaintiff's correspondents; this alone is enough to evince that good faith, which will lead the court to construe every act of the plaintiffs as done in a spirit of adoption, for in no one instance do they allege a breach of orders. We contend that the having received the freight is an adoption of the acts by which it was earned, and exonerates from all responsibility on account of disobedience.

THOMPSON, J. This was an action on the case brought by the plaintiffs against the defendant, who was captain of a ship in their employ, for breach of orders.

On the part of the defendant it was alleged, that the instructions vested some discretionary powers in him; but that, admitting he had violated his instructions, still the plaintiffs have, by their conduct, adopted his acts, and thereby waived all claim to compensation. The general principles of law, as applicable to cases of this description, are not controverted. There can be no doubt but that a captain is responsible in damages to his owners for disobedience of orders; and there can be as little doubt but that the owners may adopt such acts as would be deemed a violation of instructions, and thereby waive all claim to damages on that account. The great difficulty arises in the application of the law to the case before us. The original instructions of the plaintiffs are very particular, and seem not to give any great latitude to the exercise of discretion. They say, "It is our desire that you strictly adhere to the following instructions, which are to be considered as binding on you, and not to be deviated [*537] from." They then proceed to point out the voy

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age, and the conduct to be observed by the captain. It appears to me, clearly, that the defendant's returning to New Orleans from the Havanna, instead of coming to New York, was a breach of orders. But the most important question appears to be, whether there has not been a waiver by the plaintiffs of their claim for damages. The circumstances, relied on by the defendant, to show that his acts have been adopted by the plaintiffs, are various. Their force and importance will depend much on an accurate attention to dates. I would, in the first place, observe, that there is no pretence but that the defendant acted in good faith, and in a manner, as he supposed, best calculated to promote the interest of the plaintiffs. The great confidence which they uniformly, in all their letters, avow to repose in him, even after a breach of the orders, as appearing in the case, afford a strong presumption that the defendant, at least, if not the plaintiffs themselves, supposed he had some discretion left him as to the employment of the ship. These considerations ought to induce us to give the most favorable construction to his acts. The defendant, by letter of the 25th of November, 1799, when at sea, on the voyage from New Orleans to the Havanna, informs the plaintiffs, "that if, on his arrival at the Havanna, he finds no advice from them, he intended to go to Campeachy, if he could get permission. If he could not, he should run down to New Orleans for a freight home." This communication is unaccountable, if the defendant supposed no discretion left him, and that he was bound by the strict letter of his instructions. He probably placed great reliance on that part of his orders which expressed so much confidence in him, and declares that the chief dependence was placed on his exertions. It does not appear that the defendant received any advice whatever from the plaintiffs while at the Havanna, the first time. Their letter directed to him at that place, bears date the 28th day of November, 1799, the very day he arrived there, and there is no evidence that he received it before he left that place, which was on the

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29th of the ensuing month, on his voyage back to New Orleans. It does not appear that any freight [*538] offered for the United States, or that the *Captain sought for any. The plaintiffs, by letter, dated the 2d of January, 1800, acknowledge the receipt of the information from the captain that he proposed going to Campeachy, or returning to New Orleans, and they greatly lament such determination, on account of the high premiums of insurance on that voyage, but say nothing about his having broken his orders. Again, by letter of the 29th of January, 1800, the plaintiffs complain much of the defendant for not writing oftener, and advising them of his situation, so that they might keep the ship and cargo covered by insurance. This letter, which may emphatically be styled a letter of complaint, is so far from containing any suggestion of a violation of orders, that it expressly declares, "All the fault we find (and which is a great one) is your omission and neglect of writing us by every opportunity." When this letter was written, the plaintiffs had full knowledge of the situation of the ship; they well knew that the defendant was pursuing a different line of conduct than the one they had marked out for him; still they found no fault with this: the only complaint was, that he did not keep them advised of his situation, so that they might secure themselves by insurance. And by the testimony of Mr. Bloodgood, it appears that, in the month of February, 1800, and after the plaintiffs knew of the defendant's intention of going from the Havanna to New Orleans a second time, Mr. Ludlow, one of the plaintiffs, declared that Captain Hacker was an honest man, and that he believed he did the best for their interest, and the only fault he found was his not writing. He made no complaint of disobedience of orders. These acts and declarations, I think, afford an irresistible conclusion, that the plaintiffs intended to adopt all the acts of the defendant of which they were apprized the beginning of February, 1800. These acts included the voyage from the Havanna to New Orleans. It remains to

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be examined whether the plaintiffs have, by any subsequent conduct, adopted the acts of the defendant after that time. It appears by the defendant's letter, dated at New Orleans the 23d of February, 1800, he had received the plaintiffs' letter dated the 2d of January, 1800, wherein they gave him positive orders to come immediately home with the ship. *But by the same letter he [*539] apprizes them that he had previously purchased a cargo on their account, from which he could not retract, which made it necessary for him to proceed on the same route he went before. And by another letter of April the 19th, he apprizes them of his arrival at the Havanna a second time. After this, we find the plaintiffs insuring this ship and cargo, as their own, on the voyage from the Havanna to New York. On her arrival at New York, they took possession of her, sold the cargo, received the proceeds, and treated them in every respect as their own. This conduct it appears to me, is conclusive to show that they considered the reasons assigned by the defendant for going to the Havanna a second time, as sufficient; and that they intended to adopt his acts. In the case of *Smith and others, v. Colgan and others*, 2 D & E. 188, in a note, it was decided by Buller, J. that where a principal, with knowledge of all the circumstances, adopts the acts of his agent for a moment, he ought to be bound by them. So also, in the case of *Cornwall v. Wilson*, 1 Vez. 509, where a factor in the purchase of goods had exceeded the price limited, yet the principal received the goods, and disposed of them as his own; and it was held that this was an adoption of the factor's act, notwithstanding the principal, by a letter, had expressly disavowed receiving the goods on his own account. Lord Chancellor Hardwicke declares the principal concluded by his own acts; by taking the goods to himself, and treating them as his own; and that these acts, being subsequent to the letter disaffirming the contract, explained the nature of the whole transaction, and the

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intent with which he acted.[1] These, I think, are salutary principles, and such as the facts before us will fully warrant us in applying to the present case. I am therefore of opinion a new trial ought to be granted.

KENT, J. There can be no doubt, I think, but that the defendant was guilty of a breach of orders, in returning back to New Orleans from the Havanna. Here the deviation from his instructions commenced, and the only question is, whether the plaintiffs have, by their acts and declarations, ratified his conduct, and precluded themselves from the present suit. The rule is, that if, with a [*540] knowledge of all its circumstances, *a principal adopts the acts of his agent, he is bound by them. 2 D. & E. by Buller, J. 1 Vez. 509. This principle was recognized by this court, in the case of *Towel & Jackson v. Stevenson*, 1 Johns Cas. 110, decided in October term, 1799. In that case, the defendant received a bill of exchange to collect for the plaintiffs, and to enable the endorser to secure himself, he surrendered it up to the endorser, without receiving the money, and consequently, made himself liable. This fact was afterwards disclosed by him to the plaintiffs, who, without any express discharge to him, or ratification of his act, assumed the business of pressing the endorser for payment. The endorser failed, and this assumption of the business, after a full disclosure had been made, was held to exonerate the defendant. The defendant, in the present case, seems not to be liable to the charge of any intentional wrong. Although the great outline of the voyage was prescribed to him, he was, in every other respect, left with large discretionary powers. It is admitted, as not liable to dispute, that an explicit approbation of the conduct of the defendant would be a waiver of any

[1] See *Delafield v. State of Illinois*, 26 Wend. 192; *Lawrence v. Taylor*, 5 Hill, 107; *Moss v. Rossie Lead Mining Co.*, 5 Hill, 137; *Cuines v. Blocker*, 15 J. R. 300; *Vienna v. Burley*, 3 Cow. 281; *Towle v. Stevenson*, 1 T. C. 110; *Armstrong v. Gilchrist*, 2 J. C. 424.

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remedy on the part of the plaintiffs; and are not the circumstances in this case equivalent to such approbation? When a factor is entrusted with large power, requiring the exercise of much sound judgment, and he acts with an honest, though misguided zeal, for the interest of his principal, it is just and politic to construe the acts of the principal pretty liberally in favor of an adoption of those of the agent. After the plaintiffs had full knowledge of the defendant's second voyage to New Orleans, they insure, on their own account, the cargo and freight of such second voyage, and of the subsequent voyages back to the Havanna and to New York. They receive, sell and take to themselves the proceeds of the molasses, which were an investment by the defendant at the Havanna of what was to be traced back, as the result of part of the freight of the first voyage from New Orleans to the Havanna, and which molasses the defendant had shipped to the plaintiffs as for their account. They declare by letter to the defendant, that they have full confidence he would use his best endeavor to promote their interest, and that they find no fault with him, *except in his neglect in [*541] not writing to them, and they declared the same to other persons. These acts and declarations amount to something more than an equivocal adoption of the defendant's acts—they are a clear and intelligible approbation. The molasses were the result of a conversion by the defendant of the freight, and yet the plaintiffs accept the molasses, as shipped on their account, and sell them as their own. During all these acts, there is not a disavowal in any shape of the defendant's conduct. In the case of *Cornwall v. Wilson*, 1 Vez. 509, the factor, in the purchase of hemp, exceeded his limited price. The principal, by word, refused the contract, as he had a right to do, but he still took the goods to himself. He acted with them as his own; sold them as his own, and not as factor for his factor. Lord Hardwicke held that notwithstanding what he said, he meant to take them as his own, and de-

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creed, accordingly, that the principal was bound by the price given. The present case is certainly as strong for the defendant, and I am of opinion that the plaintiffs have sufficiently sanctioned the defendant's departure from his instructions, and are not entitled to recover against him on that ground. The verdict is accordingly against evidence, and ought to be set aside, on payment of costs.

LEWIS, Ch. J. The plaintiffs, as owners, prosecute the defendant for breach of orders, as master of their ship *Young Eagle*.

The defendant has committed a breach of those orders, and for this he is liable in damages, unless justified by the peculiar circumstances of his situation, or discharged by the subsequent conduct of the plaintiffs.

The state of the ship created no impediment. She was completely repaired at New Orleans on her first arrival there. The season of the year was a fact known to the owners at the time they gave the instructions. The want of freight and convoy cannot form a justification, as they were not events by which the conduct of the voyage was to be influenced.

For a discharge, on the ground of the plaintiffs' having adopted his acts, the defendant relies on certain conversations between Mr. Ludlow and Mr. Bloodgood, [*542] the letter *of the plaintiffs of the 29th of January, 1800, their procuring insurance on the unauthorized voyages, and their receiving and selling the cargo of molasses he brought from Havanna to New York. The substance of these conversations, was that Mr. Ludlow believed Mr. Hacker an honest man; that he did the best for their interest; and that the only fault he found was his not writing. When these conversations took place does not precisely appear, further, than that one was about the 6th of February, 1800, the other in the spring of that year. The letter of the 29th of January is to nearly the same

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effect; containing a declaration that *all the fault they found was the defendant's omitting to write to them.*

It must be remembered that at the time of these conversations, and of writing the letter of the 29th of January, it does not appear that the plaintiffs knew of his having actually committed a breach of orders. They only knew he *contemplated* it when at sea on the 25th of November, in the event of his not meeting at Havanna with advice from them. This cannot, then be construed into an approbation of conduct, of which they probably were ignorant. But were it otherwise, the approbation relied on to excuse misconduct, where by parol, merely, ought to be unequivocal and explicit; and a mere declaration of a belief in the honesty and integrity of the defendant, and a refusal to complain of his conduct, cannot be sufficient. Many an honest man has committed errors which have rendered him liable in damages, and many an injured one has refused to complain.

The acts of the plaintiffs remain to be considered. Their procuring insurance on the unauthorized voyages, and their receiving and selling the molasses. I can discover no principle on which either of these acts can be construed into an adoption of the conduct of the defendant. It would be a regulation ruinous to commerce, if whenever a portion of a merchant's property is sacrificed by the unauthorized acts of the master of his ship or consignee, that he should be obliged to jeopardize the remainder, before he shall be entitled to a recovery in damages. In the present instance, the owners' property, in neither the vessel, her cargo, nor her earnings, **was in* [*543] any wise changed by the conduct of her master. They were, therefore, perfectly correct in what they did, and their right to recover remains unimpaired. I am of opinion the defendant take nothing by his motion.

New trial granted.

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THE MAYOR, ALDERMEN and COMMONALTY of the CITY of New York against SCOTT.

The act of the legislature of 1793, re-enacted on the 3d. of April, 1801, contains no implied grant of the soil under water, therein mentioned, to the corporation of New York. They are under that act only attorneys for the public. The reservation in their resolve or by-law, of June, 1801, of the slipage arising from piers, erected under grants, made by them, in pursuance of that law, is void. The corporation has no right to slipage on the piers, running into the East River, in front of South street. A slip is an interval or vacancy between two piers. In an action for money had and received, the plaintiff must show a right in himself.

THIS was an action commenced in the justices' court of the city of New York, to recover 18 dollars and 50 cents, for wharfage. The suit being removed into the supreme court, a verdict was, by consent, entered for the plaintiffs, subject to the opinion of the court, on a case, which was shortly this:

The lands which the corporation of New York, under their charter, hold on Manhattan Island, and within the city, extend to low-water mark, and four hundred feet beyond that, in the East River. To these are annexed, "the right, benefit, and advantage of all docks, wharves, cranes, and slips, or small docks within the city, with the wharfage, craneage, and dockage, and all issues, rents, profits and advantages arising, or to arise, or accrue, by, or from, all or any of them." By an act of the legislature, passed on the 7th of March, 1793, it is declared, that "all the right, title, interest, claim and demand, of the people of this state, of, in, and to all lands, at any time heretofore left for streets or highways, in the city of New York, by any person or persons whomsoever, shall be, and hereby is, vested in the Mayor, Aldermen and Commonalty of the city of New York, and their successors, for the use of streets and highways."

In the various grants by the corporation, of their water

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lots on the north-easterly side of the coffee-house slip, they had given in fee; the right of wharfage in front, and in consideration of erecting certain piers, given to their grantees for 20 years, the wharfage, &c. of the south-westerly sides of such piers, provided they should not grant away the water-lots on that side; which they reserved to themselves a right to do, in which case the wharfage on the south-westerly side was to cease.

The corporation having granted away the whole of the land to which they were entitled, under their charter, applied, *in April, 1798, to the legislature, [*544] for an act to authorize them to run *streets* or *wharves*, of 70 feet width, in front of the water-lots already granted. This, by a law of that month and year, (re-enacted on the 3d of April, 1801,) the legislature was pleased to grant; and by the same act, the proprietors of lots on the front of which the streets or wharves might run, were to fill them up; and make piers, according to the directions of the corporation. On non-compliance, the corporation were to be at liberty so to do, and receive the *wharfage* to their own use. It was also further provided, that the corporation might grant to such proprietors, in fee, a common interest in such piers, in proportion to the breadth of their respective lots, under such restrictions, and within such limits, as the *mayor, &c.* might deem just and proper.

In pursuance of the authority conferred by this act, the corporation laid out a street, called South-street, in front of the lots they had granted, joining the East River; and on the 1st day of June, 1801, made a by-law, or ordinance, by which they ordered the respective owners of lots, fronting and bounded on South-street, from the Wall-street slip to the Fly-market slip, to make a pier on the northeast side of Wall-street; and complete it, according to the directions therein given, before the 1st day of November, 1802; on doing which, the corporation would grant the piers to the owners of the said lots, "reserving in the said grants the exclusive right, in the corporation of this city, of wharfage

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and slipage, on the side of each pier, adjoining a public slip, and that the said piers be, in all respects, considered as public *streets* or *highways*, and maintained and kept in repair by the grantees, their heirs and assigns."

Previous to the passing the act of April, 1798, the corporation had laid out the plan of South-street, and had granted to the proprietors of lots, bounded by the East River, the vacant water-lots between them and South-street.

Among the grants thus made, there was one the 10th of May, 1797, to John Murray, under whom the defendant claimed.

By this grant, Murray was to make a wharf, or street, of 70 feet in width, along the whole front of the lot. [*545] granted *to him, (which was to be South-street,) and another of at least 25 feet, along the whole *west* side of the same lot, and of the street, of 70 feet. The same to be and remain *public streets*; in consideration of upholding, maintaining, and keeping of which in good and sufficient repair, he was to have all wharfage, &c. accruing or arising, by or from the same *fronting* the East River, or by or from any part thereof.

Murray accordingly built the wharves and streets, specified in the grant, and also, under the direction of the corporation, a pier running in front of South-street, into the East River, the south-west sides of which, and of the wharves and streets he had erected, are bounded by, and in a line with, Wall-street slip, which runs in front of Wall-street, and the wharf of 25 feet, built along the south-west sides of South-street, and the lot granted by the deed of 10th May, 1797, to John Murray. This pier, so erected, was not only opposite to the water-lots mentioned in the indenture of 1797, but ran about five feet more to the south-west, upon lands within the bounds of the city, as expressed in its charter, and opposite to the wharf, covenanted in the grant to be built by Murray, which land, however, was not granted to the corporation by their charter.

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The pier, from the time of its being made, had been upheld by Murray, and no grant of a common interest in it had been made by the mayor, aldermen, and commonalty, agreeable to the act of the legislature already recited.

The sole question was whether the defendant, to whom, by mesne assignments, the rights of Murray had been conveyed, was entitled to the wharfage on the southwest side of the pier, which ran in front of the five feet of the city lands. If he was, then a nonsuit to be entered.

Riggs, for the plaintiffs. The inside of all public slips have been constantly reserved in the corporation grants for the sake of convenience to the city, that its supply by market boats, &c., might not be impeded. They are under the control of the plaintiffs, and have, in many instances, as in the present, been widened, that they might be the more effectually cleansed by the tide. For this purpose, in the act of 1798, *the piers (which form [*546] the slips) are under the direction of the *corporation*. By this act a grant to the plaintiffs of the land, on which the new piers, in front of South-street, were to be erected, must necessarily be implied; for they are authorized to grant a common interest in them to the proprietors of lots in front of which South-street ran, according to the respective widths of the same, under such restrictions and regulations as the *corporation* may think proper. They could not grant what they had not. Besides, this implication is acknowledged by John Murray. He, therefore, and those under him, are estopped from controverting it. He built under an ordinance exercising the right of an implied grant, by making reservation, in the true spirit of all the former grants of the *corporation*, and for the same beneficial purposes. It may further be observed, that by running a line from the extreme southwesterly point of John Murray's lot, it will not strike the place, for wharfage at which the plaintiffs insist on a right.

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Troup and Hamilton, contra. The act gave no beneficial interest to the corporation. They were simply trustees, or rather attorneys, to grant to others a right, in consideration of a service or duty performed. This duty was the erecting the pier, and created a consideration for the grant. Therefore, the reserving a portion of the emoluments was so far illegal and void; for a trustee cannot take to himself, and withhold from his *cestui que trust*, part of the subject of the trust. Allowing, then, an interest to have passed by implication, it was fiduciary. Then, although the act authorizes them to grant under such restrictions, and within such limits, as they may think proper, still this is no more than a power to regulate the mode and place of enjoyment; for restriction can never signify a right of acquisition. To show how completely the building of the pier was the consideration for the wharfage; whoever did erect was to have the profits; and, on this principle, when made by the corporation, after neglect of the proprietor of the lot, they were, on performing what he was to have done, to step into his place, with a full title to wharfage. We admit we have no right to wharfage in the slip, because the wharf [*547] there was on soil the property of the *corporation, and they might, in that instance, reserve. The present reservation is a manifest attempt towards a breach of trust, at the expense of the object for whom it was created. The action is for money had and received; the court, therefore, will recognize all equitable rights which we may have. We cannot be estopped by the ordinance, for we are not parties to it by sealing and signing.

Riggs and Harison, in reply. This is a cause in which the public convenience of the city of New York is deeply interested; therefore, the act and grants must be liberally construed, with that object always in view. For public benefit was the reservation of wharfage and *slipage*, on the inside of public slips, originally made. This would be entirely defeated by the defendant's claim; for if he has a

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right to wharfage on the side of the pier next to the public slip, he will have a right to lay a vessel outside of that, fastened to the pier, and another outside of that, so as to obstruct, if not entirely fill up, the access to the public slip. This shows the necessity of implying by the act a grant to the corporation of the soil under water beyond the 400 feet mentioned in their charter. The construction put on the words "restrictions," &c., cannot be correct, for the mode and place of enjoying wharfage rights is, by an express distinct law, under the regulation of the harbor master. In the rights, as expressed by the ordinance, there is an ample consideration for building the piers, for the persons thus doing so, have the emoluments arising from the sides adjoining to private property; as in the present case, those on the northeast side within the basin. This is further proved by the sense of the *legislature*, expressed in an additional clause when the act of 1798 was re-enacted, previous to which time the proprietors of lots were entitled only to a community of wharfage in front of their properties; but, by the clause alluded to, the corporation were empowered to grant, under the restrictions we contend for, that community of interest mentioned in the law.

The counsel seem to forget that a man may be estopped by his actions as well as by his deed. Having no original interest *of his own, Murray acts under [*548] our title, such as it is, and cannot now be allowed to dispute it.

LIVINGSTON, J. delivered the opinion of the court. This is an action for money had and received by the defendant, as wharfage, for vessels lying in what the plaintiffs call a slip, adjacent to that part of a pier which stands opposite Murray's wharf. From the form of action the plaintiffs must show a title in them to demand this money. It is, therefore, unnecessary to inquire whether it belongs to the defendant or not. The *corporation* can have no such right, inasmuch as the land, on which the pier is erected, was

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never granted to them, nor was the soil under the water where the vessel lay, for which this wharfage was paid. No implied grant is contained in the act of the legislature. The corporation are only to grant as attorneys of the public, in case piers are sunk. That this is to be done under certain restrictions and regulations, means, not that they shall have a right to reserve the wharfage to themselves, which is to be theirs only in case of default in the owners of the lots in sinking piers, but that they are to regulate in what manner the right to wharfage shall be enjoyed. Nor does the resolve of the common council of the 1st of June, 1801, make a difference. The reservation therein contained, if in an indenture, might have been binding on the defendant; but the corporation having exceeded their powers in making this reservation in a resolve of this kind, it cannot be binding on him. They had no right, in this way, to impose any terms they pleased, or they might arbitrarily have deprived the owners of lots of the right, which the legislature intended they should have, of sinking these piers. It cannot, therefore, be regarded in the light of a contract; for the defendant had a right to make these piers and bridges without thereby sanctioning any terms which might thus be imposed on him. Nor can it be said that the corporation not having executed the powers vested in them by the act, the individual has no right to receive the wharfage. This would be to take advantage of their own wrong and neglect; nor does it follow, as has already been observed, that the money belongs to the corporation, if it be admitted that the defendant was wrong in taking it.

[*549] *This is no slip, which is an opening between two pieces of land or wharves. This pier extends into the East River, and is 20 feet from the side of the slip. The grant to John Murray, of May, 1797, is also important, for by this he is entitled to the wharfage of 96 feet.

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It is the opinion of the court that the defendant have judgment.

Judgment of nonsuit

BLAGGE *against* THE NEW YORK INSURANCE COMPANY.

Property warranted to be neutral, must not only have every document necessary according to treaties and the law of nations to prove its neutrality, but it must not be accompanied with any papers that compromise its neutral character. If, under such a warranty on goods, the outward cargo appear to have produced less than the homeward has cost, the assured must, in a voyage from a belligerent country, show that the excess was derived from neutral funds.

THIS was an action on an open policy of assurance, dated the 18th of May, 1799, at a premium of 10 per cent. for the sum of 20,000 dollars, on the cargo of the ship *Flora*, James Lovett, master, at and from Carthagena, or any other port on the Spanish Main, to New York. The instrument contained the usual clause against illicit trade, and at the bottom the following memorandum was written.

"Warranted American property, proof of which, if required, to be made in New York, risk of seizure or detention in port excepted."

Risk of seizure, &c. was in a separate line, but there was not any stop between the words.

From the case made, it appeared the master of the *Flora* was formerly a joint owner with the plaintiff in a schooner called the *Betsey*, and had, in February, 1798, sailed in her to La Guira with a cargo in which they were mutually interested; that on his arrival there the market was overstocked, and, hearing that the port of Carthagena was opened for the admission of neutrals, he proceeded to that place, off which he got on shore. His information proving untrue, he was, on being carried into the harbor, seized

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and condemned for approaching the coast with a design to trade contrary to law. After a very considerable time, he, on an appeal to the *viceroi*, obtained a reversal of the sentence, and an order for restitution. During his stay, he became acquainted with one Thomas Andrew Thorres, who proposed to him a system of commercial intercourse, for the purpose of introducing into Carthagena, in American bottoms, goods from the United States under the sanction of the royal order of His Most Catholic Majesty of the 17th November, 1797.

[*550] *To accomplish this, it was not necessary that the articles should appear to be Spanish property; and to effect this, it was agreed that they should be consigned to Thorres as his own property, shipped for him by Blagge, his agent in New York, and that Thorres should have one fourth of the net proceeds for lending his name in the transaction.

In consequence of this, and the advantage which the speculation held out, Blagge, in April, 1799, sent, on his own account, a cargo amounting to near 70,000 dollars, by the ship *Flora*, to Carthagena, where she arrived about the 6th of May following. She there disposed of her cargo for 120,000 dollars, and in part return took in cotton, fustic, 21 ingots of gold, and 3,500 milled doubloons, to the value of 85,000 dollars in the whole, leaving, to pay duties and be collected, the remainder of the sales, in Thorre's hands, and outstanding debts. Being thus loaded, she set sail with a clearance for Cadiz, stating her loading to consist only of the cotton and fustic, on the risk and account of Don Emanuel Garcia del Rio, and also with a clearance for New York; but granted by another officer, without specifying on whose risk the cargo was shipped. In neither the one nor the other was any mention made of the ingots or doubloons; though Lovett signed, in Carthagena, bills of lading to the supercargo, for delivering both in New York; and for landing the cotton and fustic in Spain, Thorres gave a bond in a very considerable penalty

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which could only be cancelled by production of a certificate of its having been duly discharged in some European Spanish port, or on proving, by evidence, that the vessel had been captured and condemned in some British port. After the *Flora* left Carthagena, the master, as appeared from his depositions, made out an account of the sales of the outward cargo, which he stated at 55,000 dollars, and an invoice of the homeward cargo, which exactly balanced that sum, totally omitting any statement of the bullion or coin on board. Thus circumstanced, the *Flora* had proceeded on her voyage something within the cape of Florida, when she was captured by a British ship of war. On being boarded, the master showed only his fictitious invoice, clearance, and other papers for New York, excepting the bill of lading for the ingots [*551] and doubloons. On being questioned whether he had any other cargo than that mentioned in the fictitious invoice, or any other papers than those relating to the New York destination, to both he answered repeatedly in the negative. On a strict search, however, the captors found secreted on the person of Lovett, and in the vessel, the clearance for Cadiz, declarations of Thorres that the property belonged to Don Emanuel Garcia del Rio, the custom-house bond for landing the cargo in Cadiz, and several letters giving directions how to cover the shipments and returns, so as to avoid the effect of the royal order of 17th November, 1797, and also one to the plaintiff from Lovett, written immediately after his arrival at Carthagena, in which he said, "he had delivered the cargo to the owner." The captors having also discovered the bullion and doubloons, carried the *Flora* into Jamaica, where she was duly libelled in the court of *vice-admiralty*. In the answers on oath of Lovett and Paschal N. Blagge, to the standing and other interrogatories exhibited to them they swore positively that the outward and homeward cargo (excepting a few adventures of themselves and one Drake, who had been supercargo in the voyage to Cartha-

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gena) were the whole, sole and exclusive property of the plaintiff, a citizen of the United States; that the appearance of its being Spanish was entirely fictitious, but indispensably necessary to its introduction into Carthagena under the royal order of 1797; for had any other name than that of a Spaniard been seen, the whole cargo would have been confiscated. That the clearance for Cadiz, or some other Spanish port, and custom-house bond to land the articles, were the only means of clearing out, but that he (Lovett) understood a simple letter from him, stating his capture, would have been sufficient to cancel the bond, and that the reason why the bullion and doubloons did not appear in the papers granted at Carthagena was, because the exportation of bullion and specie from the Spanish colonies is prohibited, the whole on board having been smuggled into the ship by himself and Paschal N. Blagge, at the risk of imprisonment for their lives if discovered.

That they were not mentioned in the invoice of [*552] the cargo, from an apprehension lest the know-

ledge of so much treasure on board should excite the known cupidity of the British cruisers, and be a certain inducement to capture, but that the whole was the exclusive property of the plaintiff, Thorres never having had any interest in the articles, was merely allowed a fourth of the net proceeds for lending his name to introduce the cargo under the royal order of 1797. The cargo, however, being condemned "as good and lawful prize," the present suit was brought against the defendants, for the amount of their subscription, and the jury having found for the plaintiff, a motion was now made to set it aside and grant a new trial, the verdict being against evidence.

Hoffman and *Hamilton*, for the defendants. The goods on which the present insurance was made, contain the usual warranty against illicit trade, and are also warranted American property. If, then, from any circumstances of trade, or breach of neutral conduct, the capture was just-

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liable, the underwriter must necessarily be discharged. It is important to observe that the abandonment was on the capture and not on the condemnation for the abandonment was on the 1st of October, 1799, and the condemnation not till the 17th of the same month. Whatever, then, was the state of the assured's right at that period, must govern the decision of this day. The question, then, will be whether, from the circumstances of the case, there was probable cause of capture; for that is the point, however the condemnation may be, though from the words of the sentence "good and lawful prize," it is manifest the sentence proceeded on the ground that Thorres was interested with Blagge. On warranties of property the rule of law is, that the warranty is not only affirmative that the property shall be such as it is said to be, and have all documents and papers necessary to protect it by evincing its neutrality, but it is also negative that there shall be no papers tending to a contrary conclusion. 1 Marsh. on Ins. 317—319; *Rich v. Parker*, 7 D. & E. 705. So that though a vessel may be furnished with every document to establish her neutral character, yet if others tending to a contrary conclusion be found, the warranty of neutrality is not complied with.^(a)

It is necessary, therefore that a neutral *should, [*553] during the voyage, act with the most perfect good faith towards belligerents; to do this, he should show the whole of his papers, which ought to be strictly genuine; none false or fictitious, and if any should be so, they ought to be candidly produced, and the reasons faithfully related. If the invoice of the cargo be fictitious, if there be any concealment of papers, allowing even that the circumstances should be afterwards explained, they justify carrying in, and, at least, subject to further proof. It is immaterial to the underwriter whether the explanation given be received as an excuse to avoid condemnation or not; as

(a) A court of admiralty is not so rigorous. If the papers be necessary to the trade the neuter *bona fide* carries on, they will not affect her. See the cases of the *Immanuel* and *Providentia*, in 2 Rob. Ad. Rep.

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between him and the underwriter it is a forfeiture of neutrality, and the insurer is exonerated by the *mala fides* of the insured, though between him and the captor it may be only a matter of further proof. The consequences, however, as they arise from the conduct of the assured, are wholly at his risk. Having made these preliminary observations, it will be easy to show the negative of the rule that has been laid down was broken, and *that* accomplished to evince that the affirmative had not been complied with. First, then, as to the negative, that there were papers leading to a suspicion of the want of neutrality. This is evident from the affidavit of Lovett himself; he swears that he made out a fictitious invoice and account of sales. These are his words: "Well knowing the depredations heretofore made by British cruisers upon American property, where the same appeared valuable, and particularly so if in specie or bullion, this deponent was induced, from what appeared to him prudential considerations, to make a fictitious invoice of the cargo of the said ship *Flora* out from New York, and an account of sales the same in Carthagea, also an invoice and bill of lading of her cargo from Carthagea to New York, whereby it would appear that the same was only cotton and fustic, in order, that if she was boarded by a British cruiser, he might be permitted to proceed on his voyage more readily than if his cargo was fully exposed to view." It was not till after repeated denials of any other cargo, not till affirmations over and over, that there was no other cargo than the cotton and fustic on board, that the real invoice, and the several clearances were delivered up; and even then not [*554] . *till the bullion and specie were discovered.

These two articles were totally omitted in the invoice exhibited to the captors at the time of boarding the *Flora*. This alone was enough to authorize the detention of the vessel, nor is any attempt made at an explanation till the vessel is under libel in the court of admiralty. With what degree of credit that explanation could be re-

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ceived is worthy of observation. There is a bill of lading in which Lovett acknowledges the cargo to be shipped by Thorres on account and risk of Don Emanuel Garcia del Rio, of Cadiz; and though it may be said that a clearance to a Spanish port was necessary, still the manner in which the letter of advice mentioning the shipment is worded, does not tend to remove the impression of its being Spanish property, and the place of destination used merely as a blind. In that letter she is said to sail properly registered for Cadiz, "or any other port which might be to her advantage to avoid any risk arising from the enemy." If then, any other port was open to her, it is to be hoped no stress will be laid on the circumstance of her being in the track or route for New York. Spanish property may as well be sent to New York as to Cadiz. Allowing, however, this to be no more than a conjecture which a court of admiralty might make, it is impossible to get over the custom-house bond(a) given to land the cargo in Old Spain, and pay the duties. Is not this such a paper as the vessel ought not to have had? And let it be remarked that no explanation of this and the other papers evincing Spanish property, was given to the commander of the British frigate at the time of the capture. All that have been enumerated were found concealed, denied and persisted in. After the delivery of the fictitious papers, others were asked for and denied; a search took place, and they were found. Have you any other cargo than cotton and fustic was demanded? None was the answer. In a moment after the bullion and doubloons were discovered. Was not this having and doing every thing a neuter ought not to have had and

(a) "As to the condition to return to some port of Spain, which, from his paying Cadiz duties, it is said, might be imposed upon the master, I see nothing in that which will materially affect him, after the various cases from Surinam, in which, although bonds had been given to return to Holland, this court has restored, on the master's making satisfactory proof that they did not intend to comply with the condition, and intended to submit to the penal forfeiture." Per Sir W. Scott, in the *Providentia*, 2 Rob. Ad. Rep. 153, Eng. edition.

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done? Under all the circumstances of the case, can any one say the condemnation was not well warranted? For who would believe the explanations of the man [*555] whose whole tenor of conduct had shown *him unworthy of credit? The court of admiralty would naturally consider whether the explanations were consistent with the circumstances, and the former declarations of the parties. Allowing it problematic whether Thorres was the whole and sole owner, no court nor jury on earth but what would be justified in saying Thorres was interested with Blagge. But when the papers are examined, (and this court is not confined to the sentence,) it will be seen that Thorres was the actual proprietor. In a letter, written by Drake, the supercargo of the outward voyage, the confidential friend of the plaintiff, and dated a few days after the arrival of the vessel, he says, "The day after we entered the vessel we began to unload her, and deliver the goods to *the owner*, who, at the end of eight days, disposed of the whole." Who could this owner be but Thorres, to whom the goods were addressed. We are aware of the explanation given by Lovett and Drake of the arrangement made at Carthagena, that the property should be shipped in the name of Thorres. This, for eluding the revenue laws, might be necessary, but why continue the deception to Blagge himself? Is it not rather to be supposed that the truth came out? Every one must think so, and no doubt can be entertained of this letter, which certainly was not a document to prove neutral property, having influenced in its condemnation. That this was a just and proper conclusion, is manifest from the letter of Thorres to Don Emanuel Garcia del Rio. The consignment of the vessel from Blagge on Rio's account is fully set forth, and the account of return cargo, agreeing with the actual quantity of cotton and fustic, is mentioned. This letter is instantly followed by one from some Spaniards of the names of Matteo Arrage and Juan de Francisco Martin, to a Don Charles Frazer, of New York, whose

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we have never yet discovered, and to this succeed several letters pointing out the whole system of covering, by transmitting forms of invoices, &c. &c. to cloak the property. It is remarkable that this letter is dated the 5th of June, 1797, and speaks of the order of the November afterwards. This, too, was one of the secreted papers, and evidently is meant for purposes which do not meet the eye.

At all events, it is ~~one~~ of those negative *papers [*556] which a neuter ought not to have. If the court will for one instant advert to the securityship of Thorres, and consider the amount to which it extends, they will naturally say it is impossible that it should be entered into by any person not absolutely a partner in the concern. It was to be cancelled in a manner that proves Spanish interest. Either by a certificate that the articles was landed in Spain, or by proof of a capture and condemnation in an English court. How could such papers be procured? The very idea of their being to be brought forward, if the facts of capture and condemnation did not exist, leaves a most unfavorable impression on the means that must have been adopted. But it is not from inferences and reasonings that we are obliged to prove this was not American property. There is a written document, preserved on the declaration of Lovett himself, that the property is Spanish. In the clearance for Cadiz it is expressly so stated; and that is an official paper deserving full faith and credit. If the invoice be attended to, it is equally a suspicious paper. The amount of the sales of the cargo out are stated to be 55,000 dollars; the cotton and fustic, it is true, balance this; but from whence have the 80,000 dollars in ingots and specie arisen? Blagge had no funds in Carthagená; and his outward cargo is by the invoice stated to be only 55,000. These circumstances show such a mixture of interests between Blagge and Thorres, that the court of admiralty, unable to discriminate the portions, justly condemned the whole partnership concern. That this was the principle on which the admiralty proceeded is manifest, for they

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condemned what was claimed for Blagge, but acquitted Lovett's and Drake's proportion. The invoice in cyphers, however the character might have been explained, was unnecessary and dangerous paper. It is said, to be sure, to have been made for the amusement of the supercargo; but it served to throw a further air of mystery over a transaction already sufficiently mysterious. It is curious to observe the reason assigned for the taking out a clearance for Spain: That it was impossible to obtain one for any other place; and yet there is on board the *Flora* another clearance directly for New York, and both obtained [*557] from the same office. It is true. Lovett's deposition says, he does not know whether they were signed by the same officers. But that is immaterial; they establish the possibility of having a clearance for New York, and from the custom-house too. This, then, contradicts the pretence of necessity. From the case it appears, that on the trial: "it was admitted, that all trade between the American and Spanish colonies is generally prohibited, and that it is notorious that it is so; but that sometimes foreigners do obtain special license to trade with the Spanish colonies." As, then, this trade without a license is prohibited, and the clause against illicit trade is preserved in the warranty, "seizure or detention in port only excepted," it is plain the risk of illicit trade anywhere else was expressly at the hazard of the assured. If this be so, certainly the consequences of such trade was equally a peril he undertook himself to bear. It can never be contended that though the principal is not at the hazard of the underwriter, yet that he is chargeable for the incident or result. This doctrine would be against the words of the policy, and against reason itself. It cannot be presumed, that under a warranty of American property, which implies that the property shall be accompanied with all documents necessary to prove it American, the underwriters contemplated that it should have every paper to give it the appearance of Spanish. A risk not necessarily to be en-

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countered, is never to be imagined as included. The risk in port taken by the insurers would have covered the consequences of smuggling the money: but as to any other risk from illicit trade it was expressly declined. No usage can, in the present case, be set up. It was the very first voyage. Therefore, none of the arguments to be derived from the *Ostend case*, *Planche v. Fletcher*, Doug. 288, can here apply. Allowing that the papers made use of were necessary for the voyage, yet, as it was a new trade, (see *Kennoway v. Noble*, Doug. 510, contra,) the warranty being against illicit commerce, it was incumbent on the plaintiff to acquaint the underwriters of the circumstance, because it undoubtedly increased the risk. On the principle of concealment, then, there cannot be a stronger case. In the case of *Seton, Maitland & Co.* there was not only a disclosure of the articles being contraband, but the very manner in which they would be shipped was [*558] specified. But here nothing of this sort takes place, and the goods are at the usual premium for American property sent forward with all the risk attending Spanish. Independent of this, at the time of the capture, the assured being guilty of ill faith towards the belligerent, affords a justifiable cause of seizure and detention by the breach of neutrality committed, and thus exonerates the underwriter. It is no answer that the double papers and concealment of them was with a view to prevent being carried in: the fact is, that the reverse was induced, and though false papers, or even secreting them, may not lead to condemnation, yet, when these circumstances are mixed with falsehood, they warrant confiscation, and in the present case falsehood upon falsehood appears; denial after denial of papers and cargo, all of which on investigation are found to be totally destitute of truth. It is evident, then the negative part of the warranty is broken throughout. Let us, then, advert to the affirmative—that there shall be every document to prove the neutrality. From Lovett's own answer to the standing interrogatories it appears the

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vessel had no sea brief. The effect of this paper is that of a passport: and it is indispensable for a vessel to be furnished with it. *Price v. Bell*, 1 East, 663; *Rich v. Parker*, 7 D. & E. 705. That she had it not is evident from the admiralty proceedings, and the list of papers exhibited there. It may perhaps be contended, that as the treaty with France was abrogated, the doctrine in *Price v. Bell*, which was the case of an American vessel captured by a French privateer, and condemned for want of a passport, does not apply. It is not, however, only by the treaty with France that this document is required; by those with Spain, Holland and Algiers,^(a) it is equally necessary. The importance of the paper cannot be better evinced than by referring the court to the argument of Lord Kenyon, in *Rich v. Parker*, before cited. It is evident, therefore, either that the assured has not acted as he ought to have done; in consequence of which the vessel was carried in and condemned, and, therefore, the underwriter discharged, or that she was not properly documented, being destitute of a sea brief, or passport, a paper essential to the security of vessel and cargo. Under either of these positions [*559] the inference must be the same, and a new trial, it is hoped, will be awarded.

The court in its decision may look beyond the sentence, and into the other general proceedings. *Bernardi v. Motteux*, Doug. 575, the process verbal was received. So in *Colvert v. Bovi*, 7 D. & E. the court adopted the same principle, and adverted to things *dehors*^(b) the sentence. Whenever the master has been guilty of *mala fides*, even further proof is not allowed, nay, condemnation inevitably ensues. The case of the *Welvaart*, 1 Rob. Adm. Rep. 154, and that of the *Vrouw*,^(c) in the same book, 194, fully establish this.

(a) The passport by the Algerine treaty is a very different paper from the sea brief. See the form of it, 1 Lex Mer. Amer. Ap. vi. No. x.

(b) This is a mistake in the learned counsel; the court there looked at the sentence alone, which stated unwarrantable reasons for condemnation.

(c) The *Vrouw Hermina* is the case alluded to.

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Harrison, contra. This is a voyage by an American merchant to Carthagena. It is unnecessary, therefore, to refer to the evidence before the court, to show that the nature of this trade, and the necessity of a Spanish name were well known, and notorious to all the world. No one is or was ignorant that foreigners had been prohibited from commerce with the Spanish colonies, and that even their own subjects could not traffic from neutral countries, till after the order of the 17th November, 1797. Up to that period, the whole trade of the American dominions of Spain had been confined to Spaniards trading from Spain. In 1797, the order above mentioned made the relaxation alluded to; and, for the sake of supplying their foreign territories, the Spaniards allowed importations from foreign countries. This will furnish a clew to a great part of this business, and show the construction we shall contend for to be right. As to the possibility of licenses, whether they exist or not is immaterial. The want of one was never made a part of the defence. It is enough to advert to the nature of the trade, and if this was notorious, and could be carried on but in the name of a Spaniard, then that it should be used, must be considered as intended by the assured, and taken as part of the contract by the assurer. That a license was never in contemplation is manifest from the exception at the foot of the policy: "risk of seizure and detention in port excepted." What, then, is the language of the policy? We will not take this risk in port, because we know the trade. Under a license it cannot be, for the license *would protect you there: under the royal [*560] order it is equally impossible, because then a Spaniard could have no danger against which to wish an indemnity: but against a seizure in port an American would have to guard, because there alone could there be danger to him, and this we undertake. Therefore, granted that the usual clause of warranty against illicit trade is retained in the policy, this only stands in opposition to the clause at the bottom, and shows the nature of the trade

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known to be an attempt to evade the royal order of 1797. If this construction be right, then is the policy consistent throughout. No risk, say the underwriters, do we undertake from contraband trade, except when in port. All others are at your hazard, but as to the necessary means to cover the trade, *that* you, the assured, must use for our security, and as freely as you think fit. Therefore, want of good faith is not to be imputed to the plaintiff; all that he did being in the course of trade, equally within the view of himself and the underwriter. If, then, the vessel departed from hence to avail itself of the order of 1797, the necessity of the property assuming a Spanish appearance must appear to the court, and this alone will unravel the whole proceedings. Lovett's depositions in the admiralty show that it was necessary to clear out for Spain, nor does the clearance for New York convict him of a falsehood in this respect. It is requisite, for the carrying on the system of trade the plaintiff embarked in, that the vessel should be registered as having cleared out for Cadiz, to enable him to protect his cargo against their own *guarda costas*, and still they may give him another clearance for New York, which never was entered in the registry of the custom house. This violation of principle is not according to moral duty we confess, but the transaction was with a Spanish custom-house, and it is evident that the two clearances were not by the same officer; so that the explanation given stands perfectly with the nature of the trade. That the money has not been included in the clearances is elucidated by the same means; by a reference to the commerce insured. The case states it; the exportation of coin and bullion are prohibited; to take them out of the country recourse is had to smuggling, in which, if discovered, [*561] imprisonment for life is the mild penalty of the law. How, then, could it be entered and cleared? The concealment, then, here so much cried out upon, arose from the nature of the trade, and was a measure to which the assured was necessarily reduced. This

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furnishes in part, an answer to the outcry of "American property," "warranted American property," "to be furnished with all documents to prove it American property," "and none to show it Spanish," in short, to all that has been urged on the negative and affirmative doctrine of warranties. This appears more fully on viewing the memorandum at the foot of the instrument. Proof of property is by that to be made in New York. What can this mean but that the assured will not be concluded by any foreign determinations; that he reserves to a trial of his own countrymen the question of American property or not, and will not submit it to extra forensic tribunals? Why is this to be so? Because the transactions were to bear the semblance of Spanish interest, and the contrary could not in any place be so well shown as here, where all the property and business could be established; where it was necessary only to show it actually American, however it might appear. In 2 Val. 128, this position is acknowledged. There the trade was notoriously illicit, being of silk from Barcelona to France, yet, under similar circumstances as the present case, the underwriter was, on account of the notoriety, held liable. The concealment, therefore, here, is no more than a means of carrying on the trade. If this be correct, all the observations on concealment and documents are overthrown, for they are in the course of trade, and done for the benefit of the underwriter. It is true the court leaned to that idea in *Goix v. Low*, but the court of errors reversed that determination; and here it is to be observed, the nature of the trade demanded the papers made use of. They were obtained in the most perfect *bona fides* and can it be said that the contract is thereby destroyed? Against the supposition of a joint interest between Blagge and Thorres, the depositions in the admiralty are full evidence. The same was testified here; so that the proof of property, under the policy is complete. All this, however, is to be done away by *circumstances [*562] which the nature of the transactions fully explain.

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The clearance for Cadiz, and all the other documents giving a Spanish aspect to the business, are necessary proceedings to enable the plaintiff to avail himself of the royal order of 1797. The letters on the subject detail the methods to be adopted for that purpose, and though it is mentioned by Drake that the goods had been delivered to their "owner," it must be recollected it was possible *that* letter^(a) might fall into Spanish hands on the coast. But whoever it might deceive, it could not deceive him to whom it was addressed. One, it is hoped, insuperable objection to all the arguments used to evince Spanish property in the cargo is, that they are drawn merely from circumstances, whereas the evidence of neutral property in the plaintiff is derived from the most positive affidavits. The animadversion on the date of the letter is hardly worth answering. It could not, by design, have been dated in June, 1797, and speak of the order of November following; but if we make a rational supposition that, in copying the date, 1797 was, by mistake, inserted instead of 1799, the whole mystery vanishes. This seems very probable, for the letter came by a vessel which sailed in 1799. Neither is there any contradiction in Lovett's testimony as to concealment of papers; because, when examined under the standing interrogatories, they were all actually delivered up. Every measure adopted by the master of the vessel was clearly prudential; and therefore, if *bona fide*, must be protected. No argument can be drawn from the custom-house bond being entered into only for merely a fourth of the net profits; for we have the same transaction here every day for only a commission. That sea brief and passport are synonymous terms may be doubted. 1 Marsh. 817. But whether so or not is immaterial, for the vessel carried fully as authentic a document; she was commissioned as a letter of marque, and nothing stronger could be produced to substantiate her national character. That

(a) The counsel on both sides argued this cause as if the letter was from Drake to Blagge, whereas it was to one Don Manuel Thorrea.

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this should have been communicated to the underwriter cannot be urged, because when a vessel is not designed to cruise, the being commissioned is settled(a) to be an immaterial fact. The objection, however, not being made at the trial, cannot be heard. All indeed that has been said, *relating to ships' papers, is totally ir- [*568] relevant, as the warranty is only to the cargo and not to the ship. The whole case presents a statement of American property engaged in a trade notoriously to be carried on under Spanish appearances; and therefore, if the court see the warranty of property has been complied with from the general tenor of facts submitted, the verdict ought to stand.

Hamilton, in reply. To its being so our objections are twofold: one, from the conduct of the master as the agent(b) of the plaintiff; the other, on account of the defect in complying with the warranty. His conduct is connected with the question of warranty, because it is to be such as will not compromise the property. Therefore, if the conduct of the assured has that effect, it is a breach of the neutrality warranted. In *Jackson v. —* in this court, it was held that though the property warranted American, was actually so at the time of effecting the policy, yet as the assured had, by a transfer,(c) altered the nature of the subject matter the warranty was not complied with. In the present case the misconduct was glaring. First, as to the false papers; secondly, in the behavior manifested at the time of capture. On the full effect of the former, in cases like the present, there is no decision. But if it were held fatal, it would not perhaps, be too strong a conclusion. An underwriter ought to know how to calculate his risk: this

(a) *Moss v. Byrom*, is supposed to be the case alluded to. 6 D. & E. 379.

(b) A captain of a vessel is not the agent of the shipper of goods, not even when the ship is owned by the shipper, and still less when, as in the present case, there was a supercargo.

(c) Even if it be after capture: *Goold v. Un. Ins. Com.*, 2 *Caines' Rep.* 73.

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is never to be done if the assured has it in his power to give any aspect he may think fit to the property insured. In another point of view it ought to be fatal: no court ought to consider that men will act on a principle of deceiving any power whatsoever. Even policy will suggest this rule, for who can blame belligerents for intercepting our trade when they see it has been directed in a continued course of deceptive commerce? On this, again, the books afford no authority; the only case is that of the *Ostend(a)* vessel, and there the court went on the notoriety of the trade; nothing but this will afford a justificatory reason. The conduct adopted by the plaintiff's agent gave to an American adventure all the danger of a belligerent risk, and this at only a premium for a neutral hazard; this circumstance affords one of the *indicia* by which we [*564] are to judge no species of illicit trade could be in the contemplation of the underwriters. The clause at the bottom of the policy does not contradict this position; it is coupled with the proof of American property; there is no stop to disconnect them and, therefore, the court must take them together, and not with a reference to the clause against illicit trade. In this sense, therefore, the exception is nothing more than that, in case of seizure or detention in ports, proof of American property shall not be demanded in New York. It is not as contended for, a disavowal of being bound by the opinion of other tribunals; if they are not conclusive they are to be looked into, and even all other documents on which the sentence has been framed: will not, then, the court look into the general conduct of the plaintiff's agent, as it appears by the proceedings, and see if it does not amount to that of a breach of neutral conduct, which amounts to a breach of warranty, and, therefore, the verdict necessarily to be set aside?

(a) *Planche v. Fletcher*, Doug. 251, where the court went on exactly the reverse of the position of the counsel, because the usage was merely in contravention of political and positive, not natural and moral duties.

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LEWIS, Ch. J. delivered the opinion of the court. The effect and fulfilment of the warranty of neutrality, are the points on which the controversy between these parties principally turns. A distinction is set up between this and a general warranty of neutrality on account of the qualification, as it is termed, contained in the stipulation that *proof if required, is to be made in New York*. The design of introducing this clause in policies is notorious. It was to steer clear of the doctrine of the conclusiveness of foreign sentences, and cannot affect the essence of the warranty. The obligation of that must remain the same wherever the proof of performance may be exhibited. A warranty of neutrality, in a policy of insurance, imports, not merely that the property is neutral, but that it shall be accompanied on the voyage with all the accustomed documents^(a) to insure it respect as such, within the laws of nations. And, although the question has never, to my knowledge, been decided, the same principle will require that it be unaccompanied with any document that shall compromise its neutral character. Where the assured, by means of false papers, or by any other improper conduct, invests the

(a) To comply with a warranty of "neutral property," it must be accompanied with all papers and documents required by the treaties of the country to which it belongs necessary for its protection on the voyage insured. *Baring v. Royal Ex. Ass. Co.*, 5 East, 99. If, therefore, a passport with the habitation of the captain be one, a passport with his name describing him as "master of the V. of A." is a breach of the warranty. *Baring v. Christie*, 5 East, 398. But sailing with a sea letter, though without a register, if the vessel be otherwise sufficiently documented, is a compliance with the engagement. *Barber v. Phoenix Ins. Co.*, 8 Johns. Rep. 307. No paper which will increase the risk, or falsify the warranty, must be on board. A letter, therefore, in sympathetic ink, stating the property to be in others than the insured is a violation of it. *Canere v. Union Ins. Co.*, Cond. Marsh. 406, a (note.) So is any act or omission of the assured, or his agent, by claiming falsely, or omitting to claim. *Calbraith v. Gracie*, Cond. Marsh. 406, b. (note.) But if there be no warranty of the national character of a ship, she need not be documented as of the country to which she belongs. *Dawson v. A'y*, 7 East. 367. For the law as to documenting applies only to express warranties, and does not extend to those by implication. *Elling v. Scott & Seaman*, 2 Johns. Rep. 157.

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property with the double character of neutral [*565] and belligerent, *be his motives what they may, he subjects it to a risk against which the underwriter did not insure, and, of course, releases him from all responsibility. The assured stipulates, by his warranty, that the insurer shall be liable for a neutral risk alone. The instant, then, that he attempts to put him to the hazard of a belligerent risk, he forfeits his claim to an indemnity. Nor does the *dictum* cited from 2 Valin, if admitted in its broadest latitude, in the least shake this principle. For, although the underwriter may be bound to know the nature of a trade notoriously illicit, it does not follow that he is to be liable to the consequences of every ingenious device that may be resorted to as a cover for the property. But, were it otherwise, the doctrine of Valin would not apply to the case before us. The trade in which the Flora was engaged, was not notoriously illicit, for it is stated to have been sometimes permitted, at others prohibited. The underwriters appear to have intended to guard themselves against the consequences of an illicit trade, by excepting from the risk seizure or detention in port.

There is another circumstance in the present case which militates strongly against the plaintiff's right to recover. It is a maxim that neutral commerce is to be conducted with good faith towards belligerents. Their rights are to be respected as well as those of neutral nations. It is not sufficient that a part only, but the whole property, covered by the policy, must be neutral. And if a cover is attempted for *enemy's* property, by an intermixture with neutral, it is held to subject the whole to confiscation. In the present instance it is stated that the homeward cargo was purchased with the proceeds of the outward. Now the latter sold for 55,500 dollars, and the former cost 89,000 dollars. It was incumbent, then, on the assured to show that the excess was also American property. This might have been shown had the fact been so. It does not appear, however, that this was attempted. And, although

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it was a question submitted to the jury, I think we are bound to say that, as to this, their verdict was against evidence.

The court is of opinion that the verdict ought to be set aside, and a new trial awarded.

New trial.

 *IMLAY *against* SANDS.

[*566]

Probable cause of seizure is no justification for a collector of the customs or other officer making seizures under the revenue laws of the United States.

THIS cause came before the court on demurrer. It was an action of trespass against the defendant, collector of the customs at the port of New York, for seizing and taking, in April, 1799, the plaintiff's brig and her cargo, under the act of the 13th June, 1798, (United States Laws, v. 4, p. 129,) suspending the commercial intercourse between the United States and France, and the dependencies thereof.

The declaration was in the common form, to which the defendant pleaded, 1st. The general issue; and, 2d. *Actio non*, "Because that at the time when the trespass aforesaid in the declaration aforesaid mentioned is above supposed to be committed, and long before and afterwards, the said Joshua Sands was collector of the customs of the district of the city of New York, to wit, at the city and ward and in the county aforesaid; and the said Joshua further saith, that after the first day of July, in the year of our Lord one thousand seven hundred and ninety eight, and before the end of the session of congress next after the tenth day of June in the same year, to wit, on the eleventh day of March, in the year of our Lord one thousand seven hundred and ninety nine, upon waters navigable from the sea by vessels of ten or more tons burden, in the district of

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New York, to wit, at the city and ward and in the county aforesaid, John Lasher, Esquire, surveyor of the customs for the district for the city of New York, by the command of the said Joshua, (he the said Joshua being then and there collector of the customs for the district of the city of New York as aforesaid,) did seize to the use of the said United States as forfeited, the said brig and the coffee and sugar in the said declaration mentioned, the same coffee and sugar being then and there the cargo of the said brig, for that the said brig after the said first day of July, and before the end of the session of congress next after the thirteenth day of June, in the same year of our Lord one thousand seven hundred and ninety eight, to wit, on the [*567] first day of September, one thousand seven hundred and ninety-eight, at the city and ward and in the county aforesaid, being then owned by a person resident within the United States of America, to wit, by one John Vaneman, a person residing at Philadelphia, that is to say, at the city and ward and in the county aforesaid, departed on a voyage from the United States, to wit, from Wilmington, in the state of North Carolina, that is to say, from the city, ward and county aforesaid, for the Island of St. Thomas, in the West Indies, and before her return within the United States, to wit, on the first day of January, in the year of our Lord one thousand seven hundred and ninety-nine, was allowed to proceed from thence to a port in the West Indies under the acknowledged government of France, to wit, to Port Liberty, in the island of Hispaniola, contrary to the form of the act of congress of the United States of America, entitled, An act to suspend the commercial intercourse between the United States and France, and the dependencies thereof; and the said Joshua Sands further saith, that afterwards to wit, on the ninth day of April, in the said year of our Lord one thousand seven hundred and ninety-nine, a libel was filed for and on the behalf of the said United States, in the district court of the said United States, for the New York district, held at the

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said city, against the said brig and her said cargo, by the *attorney* of the said United States for the said district, praying that the said brig and her cargo might, for the cause aforesaid, and others appearing, be condemned as forfeited to the use of the said United States, and such proceedings were thereupon had in the said court, that the said brig and her said cargo, afterwards, to wit, on the eleventh day of July,*in the same year, were, by the sentence and decree of the same court, at the city and ward and in the county aforesaid, condemned, and adjudged to be forfeited to the use of the said states, which sentence and decree remained in full force and virtue, until the same was, afterwards, to wit, on the first day of September, in the said year of our Lord one thousand seven hundred and ninety-nine, reversed by the judgment *and decree [*568] of the circuit court of the United States, for the district of New York in the eastern circuit, to wit, at the city and ward aforesaid; and the said Joshua further saith, that the seizing of the brig aforesaid, and her said cargo, for the cause aforesaid, is the same taking away of the said brig, coffee and sugar in the declaration above mentioned, and this he is ready," &c.

To this plea was subjoined a notice of giving all the several facts it contains in evidence, and also that the judge of the district did, on, &c. "at a district court of the said states held in and for the said district, at the city and ward and in the county aforesaid, certify that the defendant had probable cause for the said seizure."

The plaintiff joined issue on the first plea, and to the second demurred generally.

Hoffman, for the demurrant. The only question is, whether the facts set forth on the record be a sufficient justification of Sands, the collector, for the trespass with which he is charged. It has long been settled that probable cause of seizure cannot be urged by a custom-house officer in excuse, if the event prove that there was no legal and actual

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cargo, shall be forfeited, and shall accrue the one half to the use of the United States, and the other half to the use of any person or persons, citizens of the United States, who will inform and prosecute for the same; and shall be liable to be seized, prosecuted and condemned in any circuit or district court of the United States, which shall be holden within or for the district where the seizure shall be made"

It is further enacted, "That after the first day of July next, no clearance for a foreign voyage shall be granted to any ship or vessel owned, hired or employed, wholly or in part, by any person resident within the United States, until a bond shall be given to the use of the United States, wherein the owner or employer, if usually resident or present where the clearance shall be required, and otherwise his agent or factor, and the master or captain of such ship or vessel for the intended voyage shall be parties, in a sum equal to the value of the ship or vessel and her cargo, and shall find sufficient surety or sureties to the amount of one half the value thereof, with condition that the same shall not, during her intended voyage, or before her return within the United States, proceed, or be carried directly or indirectly to any port or place within the territory of the French Republic, or the dependencies thereof, or any place in the West Indies, or elsewhere, under the acknowledged government of France, unless by distress of weather, or want of provisions, or by actual force or violence to be fully proved and manifested *before the acquittance of such bond; and that such vessel is not, and shall not be employed during her intended voyage, or before her return as aforesaid, in any traffic or commerce, with or for any person resident within the territory of that republic, or in any of the dependencies thereof."

All these facts, thus set forth in the act as working a forfeiture of the vessel and cargo, are expressly stated in the plea. The vessel is alleged to be the property of Vaneman, a person resident in Philadelphia; to have been

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voluntarily carried to Port Liberty, in Hispaniola, a port under the acknowledged government of France; in short, every circumstance specified by the act is spread on the record, and consequently the vessel must be liable to seizure. If this appears fully to the court, it is enough, and the forfeiture is an inference of law which they are, from the pleadings, authorized to draw. If so, the statement of a contradictory sentence is immaterial, and makes no difference in the reasoning. If the defence is sufficient, without the sentences, it is enough. On the facts taking place the forfeiture attached; and these appearing on the pleadings are *data* for the court to go upon, and preclude all argument against there not being an actual and real cause of seizure. In *Lockyer v. Offley*, 1 D. & E. 252, the court, on the circumstances in the case, drew the inference that a forfeiture had attached, and decided accordingly. So in *Wilkins v. Despard*, 5 D. & E. 112, the fact of forfeiture being admitted by the pleadings, the court would not allow the legality of the seizure to come in question on the record. The subsequent matter of condemnation is immaterial, and of course the reversal; because there is a perfect evidence previously on the record that shows a forfeiture. For the doctrine as to averments and allegations the court will see sufficient authority in *Williamson v. Allison*, 2 East, 452. It is there said by Lawrence, J. "With respect to what averments are necessary to be proved, I take the rule to be, that if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it, but otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, though the averment be more particular than it need have been, the whole must be proved or the plaintiff cannot [1672] recover." Apply this doctrine to the pleadings; strike out all beyond the facts, and the defence is complete; therefore, the residue need not be maintained, and the court will go on what is sufficient for the defence. It may

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be said that Vaneman did not send the vessel ; but this, if material, ought to have been stated, for it might have varied the case.

Hoffman, in reply. We do not disagree on general principles ; that is, though Sands had probable cause of seizure, still he would have been liable to the plaintiff. It is contended that the record sets forth enough to have led to a forfeiture and condemnation, and therefore the court must lay out of the question all beyond the forfeiture, and judge that there was a real, and not a mere probable cause. The court will determine on the whole record, and not take up a part, to say the court of the United States has not decided according to law. This is a question under the laws of the United States. To them the defendant applied to be judged ; we pursue that judgment through his own tribunals, the courts of his own choosing ; and they decide against him. This decision is pronounced in a court of exclusive and adequate jurisdiction. It would be nugatory to make any determination contrary to the judgment of the federal courts, because even now the present suit may be carried up to them. If the effect of the statute is to be considered, that might have been done, and the plaintiff punished under it. The court will see in the second section the penalty of the bond is the consequence of certain infringements, that may have been pronounced, and the vessel declared not forfeited. If the judgment was wrong, Sands might have appealed further, but he has himself acquiesced.

Harrison. We do not consider ourselves concluded by the decision of the United States' court. Suppose the evidence there in our favor was defective, and we afterwards acquire full proofs in our justification, shall we not use them ?

Hoffman. You should then have stated them in your

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plea; that merely follows the words of the act, and nothing further is to be intended.

THOMPSON, J. delivered the opinion of the court. The facts detailed *in the defendant's plea are ad- [*573] mitted by the demurrer to be true; and the question then arises whether those facts will afford a justification to the defendant. It is said that the sentence of condemnation in the district court evinces that there was probable cause for this seizure,^(a) and will afford grounds of justification for the defendant, who was acting as a public officer. Admitting there was probable cause for the seizure, still this will not shield the defendant from responsibility. In the case of *Leglise v. Champante*, 2 Stra. 820, it was expressly decided, that in such cases the officer seizes at his peril, and that a probable cause is no defence. This point seems fully settled in a variety of cases. The officer here is a mere volunteer, and acts at his peril, and his justification depends on the event. 3 Wil. 440. 2 Black. Rep. 912. It is not like the case of a ministerial officer who acts under process which he is bound to execute. That there was no real ground for the seizure appears by the defendant's own showing. He states that the sentence of condemnation pronounced by the district court was, on appeal, reversed by the judgment of the circuit court. The act of congress under which the seizure was made, makes no provision for the exoneration of the custom-house officer. Nothing appears but that the defendant acted in good faith, and although it would seem reasonable that where the officer acted *bona fide*, and according

(a) The supreme court of the United States has determined that a commander of a United States ship is liable to damages for capturing a vessel when there is not a probable cause for seizure; *Maley v. Shattuck*, 3 Cranch, 458, though he has acted *bona fide*, and from a belief that it was his duty to send her in; *Murray v. Charming Betsey*, 2 Cranch, 64, and that the instructions of the president are no justification any further than those instructions are warranted by law. *Little v. Burreme*, 2 Cranch, 70. In this last case whether probable cause of seizure be a justification is *queried*.

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to his best judgment, he ought to be protected, yet we are bound to pronounce the law as we find it, and leave cases of hardship, where any exist, to legislative provision. Lord Kenyon, in the case of *Warne v. Varley*, 6 D. & E. 448, treats this question as long since at rest in England. He says that custom-house officers were, until a late act of parliament, (19 G. II. c. 34, s. 16,) was passed to protect them, liable to an action for seizing goods if it ultimately turned out that the goods were not the subject matter of seizure, even though there was a probable cause for seizing them.

We are therefore of opinion, the plaintiff ought to have judgment.

Judgment for the demurrant.

*LEAVENWORTH against DELAFIELD.**THE SAME against DALE.*

Wages and provisions, during the detention of a vessel captured and carried in for adjudication, are subjects of general average. If a vessel be captured during her voyage, in settling the proportion of average, the freight will be chargeable up to the day of capture. The amount on which a general average in cases of capture is to be calculated is, the cargo on its first cost or invoice price, and charges at the port of departure; the vessel on four-fifths of its value at the same place; the freight at one half agreed to be paid.

THESE were two actions on policies of assurance [*574] from *New York to Havre de Grace. The first on the freight valued at 2,000 dollars; the other on the ship valued at 7,000 dollars.

The facts, as they appeared from the case, were these:

28d July, 1801—The vessel sailed from New York on the voyage insured.

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4th Sept. 1801—She was captured in the British channel and carried into Ramsgate.

12th Nov. 1801—An abandonment was made on both policies to the defendants in the two causes, which they refused to accept.

4th Jan. 1802—She was liberated, and afterwards sailed for Havre, where she arrived and delivered her cargo.

November, 1802—The defendants accepted the abandonments, and consented to verdicts against them, subject to calculations as to the amount to be recovered against them on incidental causes.

It was agreed that the court charges and other expenses attending the reclamation of the property, including port charges, and exclusive of wages and provisions, amounted to 4,121 dollars and 24 cents.

That the ship's crew consisted of a captain, mate, seamen, a cook and boy, whose monthly wages amounted to 221 dollars, their provisions to 110 dollars and 50 cents.

That the vessel had performed 8-9ths of her voyage, as to distance, when she was captured.

Upon the above facts and admissions the following questions were raised for the consideration of the court.

1st. Whether the wages and provisions of the crew are to be brought into general average, or to be a charge on the freight only?

2d. If on the freight only, whether,

1st. The plaintiff is entitled to recover the *whole* from the underwriters on freight? or,

2dly. Whether the underwriters on the vessel shall pay the whole? or,

3dly. Whether the plaintiff is to recover part from *the underwriters on the freight, [*575] and the residue from the underwriters on the vessel?

3d. If the latter is to be the result, then whether,

1st The underwriters on the freight are to pay

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eight-ninths of the expenses, for wages and provisions, and those on the ship the other ninth?

2dly. Or, are the underwriters on the freight to pay so much as accrued up to the 12th of November, 1801, the day of abandonment, or the 4th of September, the day of capture; and the underwriters on the vessel what was incurred from that day to the 4th of January, 1802, when the property was liberated? or,

3dly. What other rule of apportionment is to be adopted.

4th. In calculating the general average, is the cost of the cargo here, or value at the port of destination, to be the sum on which the estimate is to be made.

LIVINGSTON, J. delivered the opinion of the court. It is matter of surprise that questions, which must frequently have occurred in so commercial a country as Great Britain, and where so large a capital is employed in insurance, have not been decided in any of her courts. We must therefore, endeavor to discover what is reasonable and most conformable to the ancient laws and usages of other commercial nations; for, where precedents are not to be found, the practice of such countries may be deemed the best guide on the subject of maritime law.

We are, then, first, to determine whether wages and provisions, during a detention after capture, form a general average, or fall on the freight only?

When it is considered that capture is a disaster which generally happens without fault of the owner of goods or vessel, but by superior force, against which no human precaution can always provide, and that the expenses, here in dispute, are incurred in consequence of this *vis major*, or *casus fortuitus*, and for the common benefit of all, it is not easy to assign a reason why they should be borne by one of the parties in misfortune rather another. Of little advantage would it be to claim a valuable property,

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after *capture, unless the mariners remained for [*576] the purpose of proceeding to the port of discharge in case of liberation. It would otherwise, if acquitted, be exposed to perish, or be sold at great disadvantage. It was said on the argument, that the master was not obliged to detain his crew. Whether it be compulsory on him to do so or not, is of no moment. It is sufficient that he has done it in the present case; that he has acted with good faith, and that such detention was manifestly for the general weal. It may well be doubted, however, whether it be not obligatory on him to keep them, at least, a reasonable time; for, idle would it be, in many cases, to labor for a recovery of the property unless it could afterwards be conveyed to its intended port. The cargo, in this case, might have been sacrificed in England, if the crew had been immediately discharged. Nor is it just, as it respects this useful class of men, instantly to dismiss them in a foreign country after an accident of this kind, without affording them an opportunity of knowing the fate of the property, and a chance of defending and receiving their wages. At any rate, the objection comes awkwardly from any of those who have arrived a certain benefit from the detention of this crew, without which there would probably have been a total instead of a partial loss. But without recurring to first principles, or searching for precedents, it is not matter of contract between the different classes of underwriters to regard expenses of this kind as a subject of general contribution? Every policy contains a clause that "in case of loss or misfortune, if it shall be necessary for the assured, his factors, servants or assigns, to sue, labor and travel for, in and about the safeguard and recovery of the property," the several underwriters "promise to contribute to the charge thereof, according to the quantity of the sum by them insured." Now, if a charge for *extra* wages and provisions be one, as it certainly is, which accrues in consequence of the labor and travel thus enjoined, and be absolutely necessary to give

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effect to such pursuit, the parties to the different insurances have consented to its being apportioned among them.

In conformity with this stipulation is the practice of most of the commercial nations whose usages are known to us.

[*577] *Ricard, who treats of the commerce of Amsterdam, and after him Beawes, in his *Lex Mercatoria*, says, "If a ship be taken by force and carried into some port, and the men remain on board to take care of and reclaim her, the wages and expenses of the ship's company, during the arrest, shall be brought into general average." Page 150. For this rule the author just cited assigns this very obvious reason: "As the crew," says he, "remained on board, during an endeavor to reclaim her, these expenses were occasioned with the sole view of preserving the ship and cargo for their proprietors."

In England it is settled, that if a ship be obliged to put into port to repair, and this be necessary for the safety of all, the charges of unloading, reloading and taking care of the cargo, and also the wages and provisions of the workmen hired to repair her, become a general average: *Da Costa v. Newman*, 2 D. & E. 407. The accident in the case of *Da Costa v. Newman* had happened to the ship alone, and might, in some measure, have been owing to her feeble or impaired condition. It would have been more reasonable, therefore, that her owner, or underwriter, should have defrayed all these expenses himself, than in cases where the peril falls at once, as well on the goods as on the vessel, without room to impute fault or neglect to the owner of either. In such a case, then, it can hardly be doubted that the court of king's bench, to be consistent, would consider every consequential expense for the preservation of the whole, a general average. In *Da Costa* and *Newman*, the crew having been dismissed before the vessel was repaired, it became unnecessary to decide by whom a charge for seamen's wages and provisions was to be borne.

In France the extra wages of a crew, when a vessel puts

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into port and remains there to avoid an enemy, are a gross average. 1 Emerig. 556. The same author informs us that all *bona fide* expenses, to obtain the release of a vessel, become a general average, (*Vandenhoevel v. United Ins. Co.*, 1 Johns. Rep. 406,) if the property be released; and, after quoting the same passage from Ricard, which has been cited from Beawes, he observes that in *France, [*578] the question has uniformly been thus decided whenever it occurred. Ibid. 631.

As we are of opinion, therefore, that the sums expended in this way, during a detention which follows a capture, are to be reimbursed ratably by all, (a) the second question may be considered as also disposed of, and we will next see,

(a) Expenditures during a voyage, *bona fide* and necessarily incurred for the common benefit of ship, freight and cargo, seem to fall within the principle of voluntary sacrifices for the preservation of all, and to be subjects of general average. It has been strenuously and frequently urged, that wages and provisions are to be charged exclusively to freight; because the freight is calculated on an estimated expense in these items according to the probable duration of the voyage, and is of course a compensation for their amount. In case of an overvaluation by circumstances which shorten the passage, there is no refunding; therefore, in case it be, from accidents which prolong the voyage, underrated, it has been thought there ought not to be a contribution. But this reasoning proceeds on false grounds; the calculation of freight is made upon the supposed length of an uninterrupted voyage; at all events, the inference has been superseded by the equitable rule of *qui sentit commodum, sentire debet et onus*. Therefore, for not only wages and provisions, but for the expenses of loading and unloading, including port charges during a hostile detention, ship, freight and cargo must unite according to their several proportions. *Sharp v. Gladstone*, 7 East, 24. Nor is it to cases of capture or hostile seizure that contribution for wages and provisions is confined. On the principle above laid down, they are subjects of general average, from the first moment that a vessel, in consequence of injury, from the perils of the sea, bears away for a port of necessity to refit, to the time of her sailing on the voyage of destination, *Walden v. LeRoy*, 2 Caines' Rep. 263, and so are loading, unloading, and all other expenditures induced by the necessity. *Henshaw v. Mar. Ins. Co.*, ibid. 274. The person entitled to contribution may recover from the person liable to contribute, *Walden v. LeRoy*, 2 Caines' Rep. 263, and he from his insurer; *Baizer v. Phoenix Ins. Co.*, 8 Johns. Rep. 307, though the assured may recover in the first instance the whole of his average loss from his own underwriter, and

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If, in the present instance, the underwriters on the freight are to pay eight ninths of the sum assessed on that article, and those on the ship the other ninth; or, whether the former are to pay such part as accrued before the abandonment, and the latter what arose between the abandonment and the time of her release?

According to a decision of this court, in the case of the *United Insurance Company* against *Lenox*, the underwriters on the freight are entitled, in virtue of the abandonment, to all the *Sophia's* earnings previous to her capture; that is, to eight ninths, and those on the ship to the remaining ninth. Hence a difficulty is supposed to occur to apportion the part of the average which falls on the freight, among those two classes of assurers. The apportionment, although a little more complex, is, nevertheless, easily made. As all freight would probably have been lost, in consequence of the capture, if the property had been condemned, the underwriters on freight and on vessel being severally entitled to eight ninths and one ninth thereof, such was the *ratio* of their respective interests in this subject while in the admiralty. It therefore follows, that in the same proportion should they contribute, as it respects the freight, to the expenses of reclaiming it, regardless as to how much had accrued antecedently, and how much subsequently, to the day of abandonment. By a restoration of the property, the insurers on freight receive eight ninths, and those on the vessel one ninth. Nothing, there-

leave him to recover over. *Muggrath & Higgins v. Church*, 1 Caines' Rep. 196. This rule, however, cannot apply to an assured on a ship, who is owner of vessel and freight, which are not insured; *Jumel v. Mar. Ins. Co.*, 7 Johns. Rep. 412, because he would be immediately liable in an action by the defendant for the amount of average due from the subjects uninsured.

For wages and provisions during an embargo laid on by the government of the country to which the vessel belongs, there is no contribution, as they fall exclusively on the freight. *M'Bride v. Mar. Ins. Co.*, 7 Johns. Rep. 431. The law is the same as to the extra sum paid by a charterer by the month, during an embargo at a foreign port. *Penny & Scribner v. N. Y. Ins. Co.*, 2 Caines' Rep. 155.

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fore, can be clearer than that the expenses, as they relate to this article, must be defrayed by them in like porportion.

The last point submitted respects the matter of calculating the average. Is it to be on the first cost of the cargo or on its value abroad, and how are the vessel and freight to be appraised?

*It is difficult to adopt any rule sufficiently certain and yet free of every exception. [*579]

In an average arising from *jettisons*, the English practice is, to regulate the contribution by the clear price which the goods would have yielded at the port of destination, "it being equitable," says Abbott, "that the person whose loss has procured the arrival of the vessel should be placed in the same situation with those whose property has reached its port in safety." Abbott, 262. If all the goods, as well those which arrive as those which have been cast into the sea, are to be estimated at their foreign value, the result will be nearly the same, provided there be an equal advance on all, as if the first cost be resorted to as the standard of their worth. I cannot, therefore, perceive much force in the reason assigned by the learned author in favor of this mode. With regard to vessel and freight, various regulations have been established by different states as to the decree in which they shall be liable to contribute, which only show how impossible it is to find any rule that shall operate universally and with equal justice on the different persons concerned. In England, Marshall, following Molloy, and speaking of *jettisons*, says, the ship contributes for her full value at her port of delivery, and the freight pays according to its value at the same place, after deducting seamen's wages and certain other charges. Marshall, 467. I cannot subscribe to the equity of this mode of adjustment, as it relates to the vessel and freight. Pothier, in his Treatise on Maritime Contracts, also exclaims against it. "As the freight," says he, "is only due to the owner of a vessel, as a kind of indemnity for her deterio-

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ration and expenses incurred by the voyage, it is subjecting him to a double burden to make him contribute for the entire value of the vessel and of the freight. Our ordinance, "therefore," says he, "has adopted the middle course of making him contribute for one half of the value of each." Vol. 2. n. 119, p. 411. Other states make the vessel contribute for half her value and one third of her freight. Marsh. 467. As the rule is not accurately defined by the law of England, and the one adduced applies to cases of *jettison* only, we are at liberty to make [*580] one for ourselves. The injustice of *making the ship and freight contribute for their full value has already been stated. The first will be injured by the voyage, and oftentimes the whole freight received will not be equal to the expenses and disbursements to which the owner has been exposed. Valuing the property at the port of discharge is also liable to difficulty and embarrassment. In many cases of a contribution, the vessel may not reach her port, which would have been the case here if she had been condemned; and if she does, the vessel is very rarely sold there, and some calculation must always be necessary, to exhibit what are the net sales of the cargo. It will, therefore, be a rule less liable to objection, will suit the greatest number of cases, and not be affected by the fluctuations of markets or other contingencies, and certainly most easy of practice, always to value the goods at the invoice price, that is, at their first cost, without regard to their price abroad. What value to put on the vessel and freight, to do complete justice, is more difficult, perhaps impracticable. To take their full worth will not do. After the best reflection we have been able to bestow on the subject, we are for valuing the vessel at four fifths of her original cost, reckoning nothing for provisions or wages paid in advance; and the freight at one half of the gross sum agreed to be paid. This rule may be deemed arbitrary; so will any other that can be devised; and yet, perhaps, it will come as near as any other in producing a contribution in pro-

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portion to the real interest of each which may be in jeopardy. It is seldom a vessel will sell for more, after a voyage, than four fifths of what she cost, and, of course, the owner is not more than *that* a gainer by her being released: so, neither will his freight clear to him more, if as much, as one half which is contracted to be paid. The same course of adjustment must be pursued between underwriters.

Upon the whole, therefore, our judgment is that the mariners' wages and provisions, (*Penny and Scriber v. N. Y. Ins. Co.*, 3 Caines' Rep. 155,) from the time of the *Sophia's* capture to the day of her leaving Ramsgate, (it not appearing that she remained there unnecessarily after her liberation,) be added to the other expenses of reclaiming the property; and that this aggregate sum be paid by the several underwriters on the vessel, cargo and freight. That in ascertaining *the proportion or [*581] amount of their respective contributions, the cargo must be valued at its first cost and charges at the port of departure; the vessel at four fifths^(a) of her actual value, at the same place, exclusive of outfits and without regard to any valuation in the policy; and the freight at one half of what was agreed to be paid at Havre. That the underwriters on freight pay eight ninths of the sum which, on this calculation, shall fall on the freight; and those on the ship the whole of the contribution which shall belong to her, and also, one ninth of that which is to be borne by the freight; and those on the cargo the residue.

Judgment accordingly.

(a) But this rule does not hold when a vessel is sold at a port of necessity, in consequence of being unable to proceed on her voyage from injuries received by a peril of the sea; the amount of what she *bona fide* sold for is then the value on which to calculate her proportion. *Bell v. Col. Ins. Co.*, 2 Johns. Rep. 98.

Lyle v. Clason.

LYLE *against* CLASON.

Sending a sealed libellous letter to the plaintiff himself, is not a ground for an action by him. Every letter sent is to be presumed to have been sent sealed. In an action for a libellous letter on the plaintiff, publication must be shown. Stating it to have been by means of its being sent to, and received by, the plaintiff, is bad, and as showing on the record itself, no publication, is good cause for arresting the judgment.

THIS was an action on the case for writing and publishing a libel.

The first count of the declaration, after alleging that the defendant "wrote and published, or caused to be written and published," a certain libel, proceeded thus: "Which same libel, in the form and manner of a letter subscribed by the said Isaac Clason, on the——day of——, was wrong fully, falsely and maliciously sent, and caused to be sent, by the said Isaac Clason to the said Robert Lyle, at, &c. and the same was, *by means of such sending thereof, received and read* by the said Robert Lyle, and *thereby* published by the said Isaac Clason."

Judgment having gone by default, the plaintiff sued out and executed a writ of inquiry, on which the jury gave general damages.

Hopkins, for the defendant, now moved in arrest of judgment. The first count shows no cause of action. The introductory is to be connected with the latter part, and then the allegation of having wrote "and published," &c. is so explained as to show there was not any writing and publishing in legal contemplation. The manner in which the injury complained of was perpetrated, is always stated to have been in the hearing, or some other specific mode of communicating the libel, and of making it [*582] known. Rast. Ent. 13, Went. Plead. titles *Slander and Libels. 1 Com. Dig. tit. Action upon the

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Case, (G. 4.) *Hall v. Hennesly*, Cro. Eliz. 486. *Kellan v. Manesby*, Cro. Jac. 39. 3 Cro. 199.(a) These cases all turn on the general principle, that the *gist* of the action must be stated in *express* terms, for *generals* will not do. In assault and battery, prosecutions for conspiracy, &c. the same rule holds. The present action is for damages to compensate for an injury sustained in the opinion of others. If others knew not of the libel, no injury could have been sustained. *Hicks's Case*, Hob. 215. Poph. 139, S. C. *Barrow v. Lewellin*, Hob. 62. Edwards and Wooten, 12Rep. 35.

Harrison and *Hamilton*, contra. The second count states that the letter was sent to France open. A publication may therefore be presumed, especially, as by suffering the judgment to go by default, and an inquiry to be executed the defendant has acknowledged a cause of action. On this reason the latter part even of the first count may be rejected as surplusage, and the first allegation of publishing held to be confessed. It is allowed that by the English law a verdict would have cured the objection: a question, however, may be made, whether the distinction between verdicts and defaults, established by the English code, is known to our jurisprudence. Our act of amendments and jeofails extends to judgments by confession, *nil dicit* and *non sum informatus*. Perhaps, then, it may be consistent with our principles to say that on a default the rule is the same. It is not law to say, the mode in which a libel is made known ought to appear on the declaration. That it was published is enough. So in assault and battery, that he assaulted and beat, without the addition of knives, staves, &c. is well. Saying he published, is, therefore, saying the libel was made known. Besides, the suit itself shows it has been communicated. The expressing in the count that it was made known to others is super-

(a) *Smart v. Dr. Easdale*. After verdict, its not being alleged to be "in the hearing" of any one, in an action for words, no cause to arrest the judgment.

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fluous. *Bell v. Stone*, 1 Bos. & Pull. 331.(a) At all events, the second count states a possible publication to the person by whom sent, and we are entitled to a *venire de novo*. But it is strange to say the letter was not published, when the very cases adduced, by the counsel for the defendant, show an indictment would have lain. The mere writing libellous words gives a right of action to the party [*583] against *whom they are written. On the execution of the writ of injury, the plaintiff might have abandoned his first count, and proceeded on the second; his, therefore the court may now well intend to have been done.

Troup, in reply. It is not pretended that after judgment by default, a motion in arrest of judgment may not be made. 2 Burr. 899. *Collins v. Gibbs*. See ante, 104, *Callagan and others v. Hallett and Bowne*. If a libel, or slanderous word reach only the ears or eyes of the person libelled or slandered, no action lies. If a man, after receiving a libellous letter, makes it known, he is the publisher, and *volenti non fit injuria*. To the authorities cited we may add *Lake v. King*, 1 Mod. 58. In addition to this, there is no rule better established, than that where a declaration contains good and bad counts, and a general verdict is given, the judgment must be arrested; because it is not known to which the verdict can be applied.

Per Curiam. We agree with the counsel for the defendant, that the first count is to be considered, when taken together, as stating no other publication than the sending a letter sealed up from the one party to the other. A letter is always to be understood as sealed, unless otherwise expressed, and the law is too well settled to be now shaken, that sending a letter is no publication on(b) which to

(a) In that case the letter was to a third person, and so stated in the declaration.

(b) *Licks's case*, in Hob. 215. Poph. 139. S. C. Hob. 62. 12 Co. Ed

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ground a private suit.(a) The basis of the action is damages for the injury to character in *the opinion of others*. This cannot arise but from publication. A criminal prosecution for sending a libellous letter is not founded on publication, but on the inducement which it produceth to a breach of the peace.(b) The provocation is the same in the breast of the party libelled, whether the libel be or be not published to the world. The first count, therefore, does not state a cause of action, and the damages being general, the judgment must be arrested, unless the plaintiff wishes for a *writ of inquiry de novo*, which he is entitled to, on payment of costs agreeable to the decision in the case of *Hopkins v. Bedle*. Ante, 847.

Judgment arrested nisi.

wards and Wooten, Cro. Eliz. 487. *Phillips v. Jansen*, 2 Esp. Rep. 625, per Kenyon, Ch. J.; S. P. Wms. n. (2). *Lake v. King*, 1 Saund. 132. 2 Bl. 1038, 1 D. & E. 110.

(a) S. P. by Lord Kenyon, in *Phillips v. Jansen*, 2 Esp. Rep. 625. The contrary is, however, inadvertently stated by Williams, Serjeant, in note (2), to *Lake v. King*, 1 Saund. 132. But the cases cited do not bear out the position. In the first (*Baldwin v. Elphinston*, 2 Bl. Rep. 1037,) the court decided that "printing" was *prima facie* evidence of publishing; and "causing to be printed" confirmed the fact of publication, because it called "*in a third person*." The second was the case of a letter written to a third person, *Weatherston v. Hawkins*, 1 D. & E. 110, but not applicable to the principle for which adduced. While making this observation, I feel, from conscious inferiority, ashamed at writing, what may seem a criticism, on so truly learned an annotator. See also to the same effect *Waistell v. Holman*, 2 Hall, 172.

(b) This is the reason why a libel is a crime. Its falsity is not the offence.

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LIVINGSTON *against* ROGERS.

In *assumpsit* on mutual promises they must be laid in the declaration as concurrent. If stated to be "afterwards, to wit, on the same day," it is bad, and the promise a *nudam pactum*. If, however, there be one good count, and the damages entire, it may be amended. If the court of errors award a *venire de novo*, it must be sued out to warrant a second trial. If the cause is tried without, it is a defect of record, not amendable, and fatal in arrest of judgment. But a motion may be made for an award of the *venire* awarded. The court of errors has not authority to award a *venire* out of this court.

THIS cause came before the court on three several motions, which the counsel upon the argument agreed [*584] should *be taken, and considered together. The 1st was a motion by the defendant in arrest of judgment. The 2d one by the defendant also, for a new trial on the ground of a discovery of evidence. The 3d by the plaintiff, for leave to amend his declaration, by increasing the damages laid, so as to cover the extent of his demand.

The decision of the court was confined to only the first and third motions; and, as it embraces all the points relied on by the counsel, it is unnecessary to give the arguments used.

In support of the motion in arrest they relied on two reasons;

1st. That the several *assumpsits* in the three first counts of the declaration (which was on a stock contract) were void, for want of consideration.

2dly. That there was no record in the office to warrant the circuit record, by virtue of which the trial was had.

The counts complained of stated the agreement to deliver and receive the stock, and that in consideration the plaintiff had, *at the defendant's request*, promised to perform his part, the defendant, *afterwards, to wit, on the same day*, promised, &c.

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KENT, J. delivered the opinion of the court. This is a case of mutual promises, where the one is intended to be the consideration for the other. It is a well settled rule, that in such cases, the promises must be stated to have been made at the same time. Esp. Dig. 132. Bull. N. P. 146, 147. Hob. 88. 1 Bac. Abr. 267, (n.) in mar. new edition. *Kirby v. Cole*, Cro. Eliz. 137. Otherwise, the one antecedently made will be without consideration, and consequently, not sufficient to support the other. The question here is, whether a valid promise is laid, on the part of the plaintiff, so as to form a consideration for that on the part of the defendant. The case in Hobart uses the strong language that the promises must be at one instant, or they are *nude pacts*. It was once held, in *Howlett's Case*, Latch, 150, that to lay the defendant's promise *afterwards, on the same day*, was sufficient; because the court would not allow of any division in a day. But in other respects that case is not altogether applicable. There the defendant's promise was in consideration of an antecedent sale and delivery in part; and the point advanced, of not allowing a division in a day, is repugnant to the case of *Cooke v. Oxley*, 3 D. & E. 653. It was in *that decided, that [*585] if one party has till a different time of the same day to assent to the agreement, the other party is not held to his prior promise, and the promises are *nuda pacta*. It is clear, therefore, from this last decision, and from the reason of the thing, that mutual promises, where one is the consideration of the other, must be made not only on the same day, but at the same time: they must be concurrent engagements.[1] The plaintiff's promise is here stated to have been made at the request of the defendant. If, instead of a naked promise, the plaintiff had, at the defendant's request, done an act which was either a damage to himself or a benefit to the defendant, it would have been sufficient to have supported the defendant's promise. An *assumpsit* founded on a past consideration of beneficial service rendered to the

[1] See also *Porter v. Rose*, 12 J. R. 209.

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defendant at his request (a) is good. Such are the cases of *Franklin v. Bradell*, Hutton, 84. *Church v. Church*, T. Raym. 602, and *Stile v. Smith*, 2 Leon. 111. Vide also Cro. Eliz. 282. The reason that a past consideration, beneficial to the defendant, must be laid to have been done upon request is, that it is not reasonable that one man should do another a kindness, and then charge him with a recompense. This would be obliging him whether he would or not, and bringing him under an obligation without his concurrence. In many cases a request (b) may be implied from the beneficial nature of the consideration, and the circumstances of the transaction. But in the present case the plaintiff's promise being laid to have been made upon request, gives it no validity from that circumstance; for the request alone creates not, of itself, any consideration. In addition to the request, there must be something made or done between the parties, beneficial to the one, or onerous to the other. There must either be a consideration executed, or executory. Even one executed will do if laid to have been done upon request. The plaintiff's promise in the present case can be valid only because made in consideration of the defendant's promise; and if the latter was not made at the same time, but at a subsequent period, the plaintiff's promise was without consideration, and void. We are of opinion this is the just and necessary conclusion in this case; for the promises are not laid as concurrent, but as made at different times. The [*586] case of **Hayes v. Warren*, 2 Stra. 933, is perfectly

(a) And must be so laid. *Comstock v. Smith*, 7 Johns. Rep. 87. The latter part of the judgment in which, states a principle not necessary to the decision, and upon which very great doubt may well be entertained. It is very questionable whether, on a moral obligation, a request or consideration can be implied. For though a moral obligation containing legal considerations, the remedy for which has been lost, will support *assumpsit* on an *express* promise, it will not *ut semb.* on an *implied* one. See a very able note upon this subject in *Wendell v. Adney*, 3 Bos. & Pull. note (a).

(b) See 1 Saund. 264, note 1, by Williams, Serjt., who has collected the law on the subject of assumptions laid upon request. See also 1 Fonh. 336, and Hob. 106.

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in point. That was an action on the case upon promises, and after judgment by default, and entire damages, it was alleged, in error from the common pleas to the king's bench, that on the fourth count, which was for work and labor done, the consideration was laid as past and executed, and not to have been done upon request. Although the work and promise were both laid on the same day, it was held that it must be taken to be a past consideration, as it was stated that "*postea*" he promised, and the judgment was reversed. The work and labor here were beneficial to the defendant, but not being laid to have been done upon request, the court would not declare it so. They seemed, however, to doubt whether a request might not be inferred from some other expressions in the count, and rather intimated that had the judgment been after verdict, the request might have been inferred. But there appeared to be no doubt that the defendant's promise, by being laid as being made afterwards, although upon the same day, was to be deemed subsequent, so as to render the plaintiff's act a past and executed consideration. In a case in Burrow, *Pillans v. Van Merop*, 3 Burr. 1671, this decision is pronounced by Wilmot, J. to be absurd. It was not, however, on the ground that the consideration was not justly deemed as executed, but because, in his opinion, according to the cases mentioned, a past beneficial consideration, with circumstances to imply a request, was sufficient to support the promise. The case, therefore, for the purpose that it is cited, stands unimpeached, and is conclusive on the question. If we consult the precedents of declarations, (3 Morg. V. Mec. 142; 2 Rich. C. P. 73,) upon mutual promises, they uniformly state the promises to be concurrent; that when the plaintiff had promised, the defendant, in consideration thereof, *then and there* assumed upon himself. From hence we conclude that the promises in the three first counts of the declaration are not laid as a sufficient consideration for each other: because they are not stated to have been made concurrently, or at the same

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time, but at different times of the same day. According to the decision in *Strange*, and according to common understanding, the meanings of the expressions "afterwards," and "at the same time," are totally distinct. The [*587] *last count is good, but the damages being entire, (3 Wils. 185, Cowp. 276,) the judgment must be arrested. The case of *Crosby v. Adams and Belamy*, decided in this court in July term, 1795, and afterwards reversed upon error, is stated also to be in point. The counts in that cause were precisely the same as to laying the time of the mutual promises; and if the court of errors went upon the same objection that we have been considering, as was suggested in the argument^(a) of this cause, that decision is sufficient to uphold this opinion. Though it is not now necessary to consider the want of a record authorizing the trial, which was urged as another ground for arresting the judgment, yet, as connected with the other, it may not be inexpedient to notice it. It appears from the record, that on the first trial a verdict was given for the defendant, and an exception taken to the opinion of the judge. That upon the removal of the cause into the court of errors, the judgment of this court in favor of the defendant was reversed, a *venire de novo* ordered, and the record was remitted back to this court. This order of the court above was correct. Not having the record before them, but only a transcript of it, they could not of themselves award a *venire de novo*, but, agreeable to the English precedents, they very properly adjudged that the court below should make such an award.^(b) This is all that appears before us. This court never has made an award of a *venire de novo* in pursuance of the direction of the court of errors. The second trial was consequently, without any authority, and in our opinion, altogether null and void. There certainly

(a) By Benson, who was at that time on the bench.

(b) 2 Saund. 101, v. 1 D. & E. 783. 4 Bro. Parl. Cas. 288. 1 Lill. Ent. 243. Yelv. 76. Cro. Jac. 206. 1 Salk. 403. 1 Ld. Raym. 10. Carth. 319. Scin. 514. 2 H. Bl. 211.

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never was an instance of a new trial had without any award by the court for the same, and without any record of such award, and such new trial held good, merely in consequence of the appearance of the defendant. A defect of record is moveable in arrest of judgment, 1 Roll. Abr. 200, pl. 27, Bac. Abr. tit. Amendment, (D.) 4. Ib. tit. Juries, J. and is a deficiency that is not in any shape amendable. Irregularities in the contents, or in the execution of jury process are amendable. The process is amendable by the roll, and the circuit record is amendable by the issue roll. So mere continuances may be entered after judgment, but no case ever came up to the present. In this there was a trial without any award for it whatsoever, either upon the record or the minutes of the court. The circuit judge had no authority to try a *second time the matter in [*588] issue on the issue roll, without an award of a *venire de novo* by the court. There are cases where a trial has been held void, because the *venire* was not warranted by the roll, and the cause was tried by a different jury than that which the record directed. *Taylor v. Tolwin*, Latch, 194; *Bunks v. Parker*, Hob. 76. To hold this amendable in the present case would be unprecedented, and in our opinion, would tend to the abolition of all regularity, form and order in our practice and judicial proceedings.[1] We hold it essential that it should be made to appear that, previous to the last trial, there was an order for a *venire de novo*, the court of errors not having of themselves made such an order, and not having the authority to do it. As, then, the second trial was without any award of a *venire*, it was an absolute nullity: the judgment must be arrested, unless the party choose to move to award a new *venire*. As there is one good count in the declaration, the plaintiff may, if he choose, on the first ground, sue out a *venire de novo*, and may also amend his

[1] Venires are now abolished except in the case of foreign juries. See 1 Rev. Stat. 410, sec. 9.

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three first counts by striking (*Maddock v. Hammet*, 7 D. & E. 56) out the words "*afterwards to wit*," being the ground on which the judgment ought to be arrested. This however, must be on payment of costs since declaring. On the point of amending by enlargement of the damages laid, the court(a) is divided, consequently, the plaintiff in this respect takes nothing by his motion.

Judgment arrested *nisi*.

RATHBONE *against* BLACKFORD, manucaptor of MURRAY.

If commissioners of bankruptcy in their declaring a man a bankrupt, specify the day when he became so, it is not conclusive as to the time, they having no authority to decide it. If a man go to prison on the first of the month, continue there 60 days, in the course of which time he is fixed as bail for another, and at the expiration of that period be declared bankrupt on a commission duly sued out, he will be exonerated from his recognizance, and an execution taken out upon it be set aside. In such a case the plaintiff may prove his debt under the commission.

MOTION to set aside a *fi. fa.* issued in this cause under the following circumstances :

In July term, 1801, judgment was entered against Murray, for whom the defendant was special bail. In the same term a *capias ad satisfaciendum* was returned *non est* against Murray, and thereupon a *capias in debt* on the recognizance of bail was issued against Blackford, which was also served and returned on the 3d of July, being the last day of the term. A judgment was obtained against him in the October term following.

Blackford was committed to prison on mesne process on the 1st of July, 1801, and continued there 60 days without finding bail. A commission of bankruptcy issued against him the 20th November, 1801, and the commissioners declared he became a bankrupt on the 1st of July,

(a) Consisting of only Kent and Thompson, Justices, no others giving any opinion.

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1801; and he *was regularly discharged under the [*589] bankrupt act. Since his discharge the present execution was sued out, and his goods levied upon, under it.

Per Curiam. A motion is now made on the part of the defendant to set aside this execution, and to stay all further proceedings against the defendant. He contends that his act of bankruptcy was not complete till the expiration of sixty days after his confinement, or until the first of September, 1801; and that, inasmuch as he was not fixed as Murray's bail on the 31st of July, 1801, this debt could have been proved under the commission, and that, therefore, the present proceedings are irregular.

This naturally produces an inquiry,

First, as to the time of Blackford's becoming a bankrupt; and,

Secondly. Whether this demand could have been proved under the commission against him, for if so, it is not denied that he is entitled to relief.

By the first section of the act of congress "establishing a uniform system of bankruptcy," the remaining in prison two months, or more, on being arrested for debt, is made an act of bankruptcy. Blackford went to jail on the 1st of July, 1801, and continued there above sixty days; the plaintiff insists that by relation he became bankrupt on the day he went into confinement, and that not being then fixed for Murray's debt, the present demand was not provable under the commission. The commissioners, it is true, have undertaken to fix that as the day on which he became a bankrupt; but in this, if they have not exceeded their powers, they have at least done a nugatory act which is binding on no one. They are to declare the party a bankrupt; but no authority is given to ascertain the day of his becoming so. Nor would it have been discreet to have vested such power in them; for their proceedings being somewhat *ex parte*, and very summary, so important a fact in which many, who had no opportunity of being heard might be in-

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interested, should not, unless absolutely necessary, have been left to be settled by them. Thus, in England, the commissioners being satisfied of the debt, the trading and act of bankruptcy, declare and adjudge that the party [*590] became bankrupt *generally before the date of the commission, without a more precise specification of time. Fixing the time even thus far is merely discretionary, and for caution, the English statutes having nowhere directed them to do it; nor is their declaration, as to the period, ultimately binding on any one. Cull. Bank. Laws, 77. Without any doubt, therefore, it is competent to the defendant to controvert this act of the commissioners so far as it respects the fixing on the day of his becoming a bankrupt, and to say that it was not till long after he became so. It becomes necessary, then to determine whether the act of bankruptcy shall relate back to the time of the party's going to jail, or whether it be only inchoate on the arrest, and not complete till the sixty days expire. English decisions on this point will afford us but little aid, because it is provided by their law, that if a man "lie in prison two months he shall be accounted a bankrupt *from the time of his first arrest.*" 21 Jac. I. c. 19, § 1. This is thought to be reasonable from a presumption that no man will lie so long in prison without paying his debts or procuring bail, unless *he be insolvent at the time of the arrest.* *Coppendale v. Bridgen*, 2 Burr. 819. However strong this presumption, as the legislature of the United States have thought proper not to adopt this provision of the British statutes, we are at liberty to apply a construction of our own. This relation to the moment of committing an act of bankruptcy is considered as one of the hardest cases of which the English law admits, but was thought necessary to secure creditors against fraudulent dispositions of their property by bankrupts, whether by their own acts, or under color of legal process. Per Lord Hardwicke, in *Balton v. Hyde*, 1 Ves. 328. It is certain that men in tottering circumstances have too much temptation, as well as oppor

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tunity, of defeating their creditors of an equal distribution of their effects. But while interposing checks against practices of this kind, we should be careful not unnecessarily to adopt fictions which may operate with severity on other persons as well as the bankrupt; and, therefore where it is impossible any fraud can be practised in creating a debt to injure other creditors, and where the evidence of it is matter of record, and the transaction is evidently *bona fide*, I would not exclude it from proof under a

*commission by fictitious relations, provided it [*591] fell due, or the contingency on which it was payable happened, at any time previous to the expiration of the sixty days. It is hard that the future industry of a bankrupt, after a fair surrender of his property, should be taxed or burdened with claims which were in a state of maturity at the time of issuing the commission; and it is equally so on a creditor of this description to be denied any part of his estate, and to be compelled to trust for payment to the precarious profits of his subsequent exertions. Without, therefore, prescribing a general rule, which is not necessary, we only say that in this case, the act of bankruptcy should not be regarded as consummated until the lapse of sixty days. We are now to see

Whether the plaintiff's demand, on this principle, could have been proved against the estate of Blackford.

The 34th section of the bankrupt law provides, "that the bankrupt shall be discharged from all debts by him due or owing *at the time* he became bankrupt, and all which were or might have been proved under the commission." But for this provision the certificate would operate unequally, for if creditors whose debts arose subsequent to the bankruptcy, were permitted to share with those whose demands accrued before, the latter would be exposed to the hardship of having only a dividend under the commission, while the former, beside an equal dividend, would retain a remedy for the residue against the bankrupt himself and his future property. The privilege, therefore of creditors

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to prove, and of the bankrupts to be discharged from debts, is wisely made co-extensive and commensurate. 1 Atk. 119. Still difficulties must occur in the application of this rule as to the time when a debt shall be said to accrue. To aid in solving these difficulties, debts have been classed into such as are *absolute* or *certain*, that is, payable *certainly* and *at all events*, and *contingent* or payable only on the happening of some uncertain event or contingency.

The demand against Blackford is of the latter kind. Murray did not pay the condemnation money, or render himself to the sheriff for the same: Blackford contracted to pay it for him. If the contingency of Murray's [*592] not paying the money, or not surrendering himself, had happened at the time of the bankruptcy, the debt as against Blackford could certainly be proved.

Without examining how long after the return of a *ca. sa.* and of a writ on the recognizance, the bail may surrender, it is sufficient, as it respects the present inquiry, to say, that after the return of *non est inventus*, on a *capias ad satisfaciendum*, the condition of the recognizance is broken, and the bail are regarded as fixed in law; if the principal dies after that day, and before a surrender, they are fixed beyond relief; and were the plaintiff to apply to prove his debt while the bail were in that situation, the assignees would have no right to say that the bankrupt, *ex gratia*, might yet surrender the principal, and thus defeat the claim. He might with propriety answer that what the bankrupt would do he could not tell, but that until a surrender was made, which he would not compel the bail or his principal to make the possibility of such an event ought not to be alleged against proving an existing demand, which accrued the moment the recognizance was forfeited.

In our judgment, therefore, Blackford was sufficiently fixed as the bail of Murray at the time of his bankruptcy to confer on the plaintiff a right to prove his debt under the commission against him, and that the *feri facias* issued

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since his discharge must accordingly be set aside with costs
 Motion granted.

GOVERNEUR and KEMBLE *against* THE UNITED INSURANCE
 COMPANY.

THE SAME *against* THE SAME.

If a commander of a convoy make a friendly capture of one of his convoy, it will not exonerate the underwriter, being a case of abandonment as for a total loss.

THESE were two causes, the one a policy on the cargo of the ship *Indiana*, the other on a similar policy on that of the barque *Bekkeskow*; verdicts having been rendered for the plaintiffs, two questions were submitted without argument.

1st. Whether the verdicts for the plaintiffs were agreeable to evidence.

2nd. Whether they were agreeable to law.

The material facts in both cases were the same. The vessels and cargoes were Danish, insured as such at war premiums, *at a time of actual hostility [*593] subsisting between Denmark and Great Britain.

The circumstances on which the question submitted arose were, that these policies were affected for account of a Mr. Murphy, a merchant of the island of St. Thomas, on voyages from thence to the United States. That Captain Barry, commander of the American ship of war *United States*, being on the West India station, for the protection of the American commerce, was requested by Mr. Murphy, on whose account the insurances were made, to take both vessels under his care, and protect them all in his power. That for this purpose Captain Barry, when at sea

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took from the masters of both vessels their papers. Against their opinion and consent, and put on board of their prize masters, ordering them for the United States, as prize to his ship. That after parting from the ship United States, they were severally captured, the one carried into Halifax, and there acquitted on payment of costs; the other into Bermuda, and there condemned as good and lawful prize.

Per Curiam. The conduct of Captain Barry was certainly not authorized by the request of Mr. Murphy. He acted however, with the best intentions; and his measures appear to me rather to have lessened than to have increased the risks. The acquittal of the one vessel was probably owing to them; for their papers, showing the property to be Danish, must have insured the condemnation of both. I can see no reason, therefore, why the underwriters should not be held to their responsibility, and am of opinion the verdicts are neither against law nor evidence

Judgment for the plaintiffs.

 DELAMATER against BORLAND.

In a suit to recover a stake deposited on a wager, evidence of money due on a note of hand cannot be given. If the declaration be for ten dollars and the judgment for fifteen, it is fatal on error from a justice's court.

IN error, on a *certiorari*, from a justice's court. The declaration was for ten dollars deposited in the hands of the defendant below as a stake on a wager. The evidence at the trial was of 25 dollars due on a note, upon which five had been paid, and the judgment was for fifteen dollars.

Per Curiam. It appears that the plaintiff below declared for one thing, and gave evidence of another

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totally variant. *To this the defendant made an [*594] objection, which was overruled. In the next place, the declaration is for ten dollars, and the judgment for fifteen. Both errors are fatal, and there must be a reversal, with costs.(a)

Judgment reversed.

(a) The multiplicity of cases from the justices' courts will excuse the insertion of the following determination, by which it was decided that they have no jurisdiction under the joint debtor act.

JONES AND CRAWFORD against REID.

JANUARY TERM, 1799.

Per Curiam. It is a clear and salutary principle that inferior jurisdictions, not proceeding according to the course of the common law, are confined strictly to the authority given them. They can take nothing by implication, but must show their power expressly given them in every instance.

The sound rule of construction, in respect to justices' courts, is accordingly this: to be liberal in reviewing their proceedings as far as respects regularity and form, and strict in holding them to the exact limits of jurisdiction prescribed to them by the statute.

To apply these principles to the present case:

The act making joint debtors answerable to their creditors separately and giving a new mode of proceeding, is posterior to the act granting civil jurisdiction to justices of the peace, and makes no mention of them. It directs that process shall issue against the joint debtors in the manner then in use, and if either be taken and brought into court, he shall answer. This act contemplates, in every instance, a compulsory process on which the defendant is taken and brought into court, and until that be done the court cannot proceed in the cause; whereas, the ten pound act, giving civil authority to justices, intends only a summons in the first instance against freeholders and inhabitants, having families, and if the summons was personally served, and the defendant does not appear, the justice cannot compel him, but is to proceed and try the cause without his either being taken or brought into court. The joint debtor act accordingly gives a power and jurisdiction different from and unknown to the ten pound act. So in respect to executions the joint debtor act directs that the execution shall be against all the debtors; but shall not, however, issue against the body or sole property of the one not taken and brought into court. Whereas, by the ten pound act, execution is directed to go against the entire goods and chattels of the person against whom it is granted, and for want of sufficient goods of such person, to take his body. Here are new powers and new modes of proceedings, applicable to the courts of common law, and contrary to the express forms and directions given to the justices' courts, and in which no mention is made of them.

Delamater v. Borland.

We are therefore of opinion that, according to the settled rules of interpretation, justices of the peace have no jurisdiction in the case of joint debtors, unless both are duly served with process, and, therefore, that the judgment in this case must be reversed.*

*By the 18th section of the revised act, (Rev. L. N. Y. 509,) in cases of joint debtors where one is not served, jurisdiction is given to justices of the peace, similar to that exercised by the supreme court under the 13th section of the statute for the amendment of the law.

PROMOTIONS IN THIS TERM.

AMBROSE SPENCER, Esq., as Judge, vice RADOLIFF, Judge, resigned.

JOHN WOODWORTH, Esq., Attorney-General, vice AMBROSE SPENCER, promoted.

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2. The act of the legislature, of 1798, which was re-enacted on the 3d of April, 1801, contains no implied grant of the soil under water therein mentioned, to the corporation of New York. They are, under that act, only attorneys for the public. The reservation in their resolve of June, 1801, of slirage arising from piers erected under grants made by them in pursuance of that law, is void. The corporation has no right to slirage, from piers running into the East river, in front of South Street. A slip is an interval or vacancy between two piers. *Mayor, &c. v. Scott*, 543

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1. Two persons, including the master, are not a sufficient crew for a vessel of 35 tons, from New York to Edenton, in North Carolina; and of this, if it appear in the evidence on the case made, the court will judge. *Dow v. Smith*, 32

2. An adjustment, if made on a disclosure and knowledge of all circumstances, is never to be opened, except for fraud or mistake in facts not known. *Id.*

3. Information being received at the same time of a vessel's capture, recapture, and being carried into a port of the country to which bound, takes away the right to abandon. In such a case, if she and her cargo be sold at auction, the charges fall on the as

- sured: *Quara*, whether newspaper information be such on which an abandonment can be made? *Muir v. United Insurance Company*, 49
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5. If a vessel be driven by distress into a French port, where part of her cargo is taken away by the officers of government, and she prevented from taking away her original loading, she may, without incurring the penalty of the French intercourse bill, purchase and load with the produce of the country. A passport granted by any particular country, to protect against its own cruisers, is not a sailing under the protection of the flag of the government granting the passport, so as to stamp a national character, and break a warranty of neutrality. *Jenks v. Hallett & Bowne*, 60
6. In a policy on a vessel in a distant port, from whence she is to sail, and stated to be there on a certain day, "at, and from" mean the day on which she is mentioned to be there, and the policy takes effect from thence. It is not necessary to disclose how long a vessel has lain in port antecedent to a policy. The two per cent. deducted on a total loss, is in cases of disaster, a part of the premium. *Kemble v. Bowne*, 75
7. All damages arising immediately from a jettison are to be contributed for, though they happen to perishable articles which are enumerated in the memorandum, and remain in specie. Freight and vessel are to be estimated in a general average, at the place where the one is paid, and the other is at the time of settling. *M'Grath & Higgins v. J. B. Church*, 217
8. A general policy unaccompanied with any warranty, covers, if made by a neuter, war risks of all kinds, and against all countries. Under such circumstances, a false character is immaterial and need not be disclosed. Seaworthiness is always implied, and never at the risk of the underwriter. *Barnwall v. Church*, 217
9. Under a general policy on goods, the assured need not disclose that his interest is only of an undivided part, but may recover according to his interest. If a vessel be captured and acquitted, the insurer is liable to the expenses incurred in prosecuting an appeal interposed against the sentence condemning the assured to costs, and to obtain compensation for damages occasioned by plundering or embezzling, though the expenses surpass the amount of the underwriter's subscription. Whether the expenses incurred in an appeal be reasonable or not, is matter for a jury. *Lawrence & Whitney v. Van Horne & Clarkson*, 276
10. A representation that a man has been naturalized "since" a particular time, does not mean that he has been so "ever since." *Coulton v. Bowne*, 286
11. If a vessel be rendered, by the perils insured against, unable to proceed with her original cargo, it is a loss of the voyage, though she may be able to perform it with another more buoyant. When a vessel cannot be repaired for half her value, she may be abandoned. If a vessel be duly abandoned, and refused, and after a sale for the benefit of all concerned, under an order of a court of admiralty, pronouncing her not worth repairing, she be bought in by a part owner, supercargo, it is not a waiver of the abandonment, though, on her arrival at her home port, she be sold at auction by the assured for more than she cost, and he at the time of action brought have the proceeds in his hands. Nor need he make a tender of her to the underwriter when she arrives, nor of her proceeds after sale. *Abbott v. Broome*, 292
12. The implied warrantee of seaworthiness in a vessel is, that she shall be able to perform her voyage with the cargo with which then loaded. *Ib.*
13. If, after a vessel has been abandoned, she arrive in port, and be there fitted out by her former owners, and sent on another voyage, it will be a waiver of the abandonment. *Saidler v. Church*, (n) 297
14. Receipt of freight earned by a vessel abandoned is not a waiver of the abandonment if the underwriter did not accept. *Abbott v. Broome*, 292
15. A warranty of being the property of an American citizen is proved by reputation, employ, and domicile. Interest in a vessel, by a person who saw the original register in the name of the owner, when she was about to sail on the voyage insured. Interest in a cargo, by knowing the articles bought by the plaintiff and seeing them go on board. To prove an

abandonment, parol evidence is admissible, and it is not necessary to give notice to produce the letter of abandonment, to enable to show in evidence the original of which it was a copy. *Peyton v. Hallett*, 363

16. Neither an acquittal nor a restitution of goods prejudice an abandonment once duly made. In case of a restitution of goods to an owner, at a port into which a vessel is carried, he is not bound to send them on to their port of destination. Though an adjustment made by the agent of the out-door underwriters does not conclude the insurer from showing errors in it, if they do not dissent, they are bound. *Bordes v. Hallett*, 445

17. If both insured and insurer in a policy containing the usual clause of warranty against contraband, know there is contraband on board, the warranty will apply only to the goods assured. *Borne v. Shaw*, 489

18. In a policy on commissions on lawful goods, the warrantee on contraband is not broken, though the assured be captain, and consignee of illicit articles, shipped on board without the knowledge of the underwriter. *Dupeyster & Charlton v. Gardner*, 492

19. In judging whether a vessel has been lost in a voyage insured, the usual, and not the utmost length of such a voyage is the period on which the jury is to proceed. If two storms are given in evidence, on a policy for time, the one within and the other without the period, it is for the jury to say in which the loss happened. An insurance on freight and cargo, after a knowledge of a storm, does not conclude the jury from finding the vessel lost in a previous storm. *Brown & Kimberly v. Neilson & Bunker*, 525

20. Property warranted to be neutral, must not only have every document necessary to prove its neutrality, according to treaties and the law of nations, but it must not be accompanied with any papers to compromise its neutral character. If under such a warranty on goods, the outward cargo appear to have produced less than the homeward one cost, the assured in a voyage from a belligerent country must show that the excess was derived from neutral funds. *Blagge v. United Ins. Co.*, 549

21. If a commander of a convoy make a friendly capture of one of his convoy, it will not exonerate the underwriter, and in a case of abandon-

ment as for a total loss. *Gouverneur & Kemble v. United Ins. Co.*, 592

INSTALMENT.

See COVENANT, 1.

INTEREST

See INSURANCE, 9, 15; PRISONER, 1.

INTRUSION.

1. Intrusion for a forfeiture of lands granted in fee, will not lie before office found. Intrusion must be of the actual possession of the people *The People v. Brown*, 416

ISSUE.

1. A younger issue being tried at a circuit is not always conclusive that an older might have been brought on. *Weed v. Ellis*, 115

See PRACTICE, 59.

J

JETTISON.

See AVERAGE, 1; CARRIER, 1; INSURANCE, 1.

JUDGE.

See MANHATTAN COMPANY, 1; PRACTICE, 48, 69.

JUDGE'S CERTIFICATE.

See PRACTICE, 75, 77, 87, 94.

JUDGE'S CHARGE.

See PRACTICE, 47, 49.

JUDGE'S NOTES.

See PRACTICE, 73.

JUDGMENT.

1. A judgment in a sister state is

only *prima facie* evidence of a debt, and the consideration examinable in our courts *Hitchcock & Fitch v. Aiken*, 460

See BOND, 1, 2; COGNOVIT; ESCAPE, 1; PRACTICE, 2, 16, 35, 44, 56, 57, 82, 86, 95.

JUDGMENT AS IN CASE OF NONSUIT.

See NONSUIT.

JUDGMENT INTERLOCUTORY.

See PRACTICE, 2, 28, 44.

JURISDICTION.

See FORCIBLE ENTRY AND DETAINER, 1; INDICTMENT, 1; JUSTICES, 1; PRACTICE, 48.

JURY.

See STRUCK JURY.

JUSTICES.

1. The justice's court has no jurisdiction in suits by or against executors or administrators. *Way v. Carey*, 191

2. The declaration in a justice's court should be so far formal as to show the cause of action, or it will be fatal on error. *Houghton v. Strong*, 486

See PRACTICE, 96; WITNESS, 7.

JUSTIFICATION.

1. Probable cause of seizure is not justification to a custom-house officer, seizing under the revenue laws of the United States. He seizes at his own peril. *Imlay v. Sands*, 566

See EVIDENCE, 3; LIBEL, 2.

L

LARCENY.

See COLLATERAL ISSUES, 1; INDICTMENT, 1.

LEVY.

See SHERIFF, 3, 11

LIBEL.

1. The denying any disrespectful intention in a libellous publication on the court, is no justification, if the words published be, in the opinion of the court, contemptuous. *The People v. Freer*, 485

2. The intent of a publication will not justify it, if, in the opinion of the court, it be a contempt against them. *The People v. Freer*, 518

3. Sending a libellous letter to the plaintiff himself is not a ground for an action by him. Every letter sent is presumed to have been sealed. In an action for a libellous letter, the plaintiff must show a publication. Stating it to have been, "by means of its being sent to and received by" the plaintiff is bad, and, as showing on the face of the record no publication, is good cause for arresting the judgment. *Lyle v. Clason*, 581

See PRACTICE, 78.

LIMITATIONS.

1. In an action on a promissory note made in Connecticut, our statute of limitations may be pleaded in bar. *Nash v. Tupper*, 402

M

MANDAMUS.

1. A mandamus lies to the court of common pleas for not signing a bill of exceptions. *The People v. The Judges of Washington County*, 511

See PRACTICE, 9.

MANHATTAN COMPANY.

1. If a judge, under the sixth section of the act incorporating this company, grant a warrant for the appointing appraisers, he cannot revoke it. A freeholder of the city of New-York is,

under that section, incompetent to act as an appraiser of the damages done in the streets by laying the Manhattan pipes. *Corporation v. Manhattan Company*, 507

MAP.

See GRANT, 1.

MASTERS OF SHIPS.

See BREACH OF ORDERS, 1.

MEMORANDUM IN A POLICY.

See INSURANCE, 7.

MERITS.

See PRACTICE, 18, 57.

MILITARY LANDS.

1. Under the act of the 8th of January, 1794, for registering deeds of military lands, &c., a prior deed not deposited in the clerk's office, is void against a subsequent purchaser for a *bona fide* consideration, whose deed is deposited. *Jackson, ex dem. Potter v. Hubbard*, 82

MISTAKE.

See PRACTICE, 8, 16, 51, 57.

MITIGATION.

See EVIDENCE, 3.

MONEY HAD AND RECEIVED.

1. In this action the plaintiff must show a right in himself. *Mayor, &c., of New York v. Scott*, 543

MONEY, PAYING INTO COURT.

See PRACTICE, 10, 94.

MUTE, STANDING.

See COLLATERAL ISSUES, 1.

N

NATURALIZATION

See INSURANCE, 10.

NEUTER.

See INSURANCE, 8, 20.

NEW YORK.

See CORPORATION, 2; MANHATTAN COMPANY, 1.

NEW EVIDENCE.

See PRACTICE, 21.

NEW TRIAL.

See EVIDENCE, 2; PRACTICE, 10, 2.

NISI PRIUS RECORD.

See PRACTICE, 83.

NON-ENUMERATED MOTION.

See PRACTICE, 18, 32; RULES, 2.

NONPROS.

See PRACTICE, 65, 82.

NONSUIT.

1. Though unavoidable circumstances may be an excuse for not having judgment as in case of nonsuit, yet they will not excuse costs. *Russel v. Ball*, 252

See PRACTICE, 4, 16, 26, 37, 38, 47, 56, 60, 66, 93.

NOTICE.

See BILLS OF EXCHANGE, 1; EVIDENCE, 4; INSURANCE, 15; PRACTICE, 3, 5, 6, 8, 13, 26, 31, 32, 37, 41, 44, 50, 51, 53, 57, 59, 60, 71, 79, 80, 87.

O

OBLIGATION; OBLIGOR, OBLIGEE.

See BOND.

OFFICE FOUND.

See INTRUSION, 1; PEOPLE, 1.

ONONDAGA LANDS.

See MILITARY LANDS; PRACTICE, 62.

OUSTER.

See POSSESSION, 1.

P

PAPERS NOTICED TO BE PRODUCED.

See EVIDENCE, 4; INSURANCE, 15.

PAROL EVIDENCE.

See EVIDENCE, 6; INSURANCE, 15.

PARTNERS AND PARTNERSHIP.

1. Facts from which a partnership may be inferred are matter for a jury, and should be rebutted by evidence. An endorsement by one of a firm in his name and company, is good to bind the other partners, though the firm has always been known by the name of another partner and company, unless it be shown that there is such a distinct house as that by the style of which the endorsement is made. *Drake and another v. Elwyn et al.*, 184

2. An endorsement in the name of a firm by a partner is good, and may be declared on as the endorsement of the firm. *Manhattan Company v. Ledger*, 192

See PROMISSORY NOTE, 2.

PARTITION.

See PRACTICE, 7, 14, 45.

PASSPORT.

See INSURANCE, 5.

PERFORMANCE.

See PLEAS AND PLEADING, 1.

PEOPLE, THE.

1. The people can acquire seisin of possession of lands granted in fee for a breach of condition, only by matter of record and office found. *The People v. Brown*, 416

PERJURY.

See SLANDER, 1.

PERISHABLE ARTICLES.

See INSURANCE, 7.

PHYSICIAN.

1. There is no settled fee for physicians in the city of New York for taking a student. *Hart v. Hosack*, 25

PILOT.

See ASSUMPSIT, 2.

PLEAS AND PLEADING.

1. An averment of being "ready and prepared to execute a conveyance according, &c., but that the defendant did not attend, and has refused," is a sufficient stating of an offer to perform by the plaintiff. *Miller v. Drake*, 45

See ACTION, 1; ASSUMPSIT, 3; AWARD, 1; FORCIBLE ENTRY AND DETAINER, 1; FRAUDS, STATUTE OF, 1; LIMITATIONS, 1; LIBEL, 3; SLANDER, 1; TRESPASS, 2.

POLICY OF INSURANCE.

See ABANDONMENT, 1; ADJUSTMENT; AVERAGE, 1; INSURANCE; SEAWORTHINESS.

POSSESSION.

1. A sole possession for forty years, by one tenant in common, amounts to an ouster. *Van Dyck v. Van Beuren & Vosburg*, 84

2. An adverse *pedis possessio* for twenty years and upwards, with a claim of title in other lands, in right of that *pedis possessio*, which lands are part of the lot on which the *pedis possessio* is taken, is a bar to a recovery in ejectment. *Jackson, ex dem. Putnam v. Bowen*, 358

See HOLDING OVER, 1; INTRUSION, 1; PEOPLE, 1; PRESUMPTION, 1.

POSTEA.

See PRACTICE, 63.

POUNDAGE.

See SHERIFF, 3.

PRACTICE.

1. If notice for applying for a commission specify names of commissioners, and the party served do not then object, he is concluded. *Townsend v. New York Ins. Co.*, 4

2. In an action on a note or bill, if, after default, rules for interlocutory judgment and assessing damages be not entered, the court will set aside the proceedings, though if the default be regular that will stand, with liberty to perfect the judgment in the term, if the plaintiff can so do. *Griswold v. Stoughton*, 6

3. Trial by record must be brought on by notice, as in cases for argument. *Manhattan Company v. Herbert*, 6

4. After stipulation, the court will, on special circumstances, allow a second excuse against a motion for judgment, as in case of a nonsuit. *Livingston v. Delisfield*, 6

5. Notice of motion to refer must contain names of referees; the court

only appoints and does not nominate them. *Bedle v. Willett*, 7

6. Notice of a motion may be for some other than the first day of term, but then it must show an excuse why not given for the first day. *Ib.*

7. In partition, the rule to appear and plead must be moved for, and is not of course. *Seaman v. Davenport*, 7

8. Misprision of a clerk in drawing up a rule of court will be amended; and if notice of the error has been immediately given to the adverse party, the same benefit may be had as if the rule had been right. *J. B. Church v. United Insurance Company*, 7

9. Peremptory mandamus will be set aside, on motion, if unfairly obtained. *Everitt ada. The People*, 8

10. On moving for a new trial, the court will not order the amount of the verdict recovered to be brought into court, though admitted to be due, the special bail bankrupts, and the principal, on the eve of insolvency. *Halet v. Cotton*, 11

11. Costs of a fine levied by the sheriff are not payable by the party on whom levied. *Gilbert v. Brazier*, 13

12. Liberty to turn a case into a special verdict, stays execution till the next term after decision given. *Van Dyck v. Van Beuren & Vosburg*, 13

13. In ejectment against several defendants, though they sever in pleadings, and enter into separate consent rules, the notices and pleadings must be entitled against all. *Jackson, ex dem. Jauncey v. Stiles*, 19

14. In partition, only notice and affidavit of service is read, not the petition. *Bell v. Rhinelander*, 20

15. If the plaintiff, in ejectment, count upon demises by persons who are dead, the defendant, after entering into the consent rule, may apply to have their names struck out of the declaration without costs. *Jackson, ex dem. Low v. Reynolds*, 20

16. Mistake, by an attorney, of a rule of practice, may prevent judgment, as in case of nonsuit, but will not prevent costs. *Sheffield v. Watson*, 22

17. On producing the certified copy of an original writ, the count, in the declaration, may be amended by it. *Fallmer v. Steele*, 22

18. On a non-enumerated motion for irregularity, merits cannot be en-

- tered into, but on merits irregularity may be shown. *Remsen v. Isaacs*, 22
19. If a case made do not set forth the merits of the cause as they appeared on the trial, and the amendments proposed do not reach the hands of the counsel employed within a time agreed on, and within which they might, but for accident, have arrived, the court will grant a further day to amend and perfect the case. *Hun v. Bourne*, 23
20. All cases intended for argument must be duly noticed before the term to the clerk, that he may enter them. *Anonymous*, 24
21. The court will not grant a new trial when there has been evidence on both sides. Applications for new trials on subsequent discovery of new and material testimony, must state it, that the court may judge of its materiality. *Halsey v. Watson*, 24
22. Entering into an agreement in the nature of a rule, to stay proceedings on a bail bond, and, after notice of bail, declaring in the original suit, is a waiver of a right to a plea in the bail bond suit. If the plaintiff proceeded on the bail bond, he will be entitled to costs only up to the time of notice of special bail; and, on payment of those, all subsequent proceedings will be stayed. *Huguet v. Hallett*, 55
23. Last proclamation of a fine made *nunc pro tunc*. *Van Ness v. Gardiner*, 59
- 24. If, after suit brought, the sum be reduced by a partial payment, below \$250, and a cognovit taken for the residue, supreme court costs cannot be taxed. The plaintiff should have taken his cognovit and entered his judgment for a sum above \$250. *M'Gregor v. Loveland*, 66
- 24a. If, in the leading suit of causes consolidated, more than \$250 are recovered, it will not entitle to supreme court costs in suits where less are recovered. *Ib.*
25. If a suit be compromised between the parties, without the knowledge of the attorney, and nothing said about the costs, each party pays his own. *Watson v. De Peyster*, 66
26. Notice of a motion for judgment as in case of nonsuit, sent by the mail, is not good, though it might save a default. *Hudson v. Henry*, 67
27. To an application for a *superseas*, for not having been charged in execution within three months after judgment, it is a good answer that the defendant has since been charged. *Manhattan Co. v. Smith*, 67
28. Attorneys, on being retained, should examine the state of proceedings, though it is but fair that, on notice of retainer, the plaintiff's attorney should disclose them; for want of so doing, in a suit against bail after default entered, writ of inquiry and judgment thereon set aside. *Steels v. Tenant*, 68
29. The suing out of the writ is the commencement of the suit, and if it appear on the pleadings that the cause of action be subsequent, it is fatal on special demurrer. *Lowry v. Lawrence*, 69
30. The court will not pronounce judgment on a prisoner convicted atoyer and terminer, if the record be not before them. *M'Neil's Case*, 72
31. Service of a notice of motion on a person in the house of the attorney is not sufficient: it ought to be on the clerk. *Anonymous*, 73
32. Service of notice on an agent, for non-enumerated motions, may be on the first day of the term for the next non-enumerated day; but there must be an excuse for not noticing for the first. *Moyle v. Gillingham*, 73
33. A commission to examine may be before issue joined. A rule for a commission suspends the trial till the rule be vacated, or leave to proceed obtained. But if the defendant appear at the trial and examine witnesses, it will be a waiver of the rule to vacate. *Brain v. Rodolicks & Shivers*, 73
34. When there are cross causes, and the plaintiff in each suit has a verdict, if material facts be omitted in the case made by the defendant, and the papers from whence they are to be ascertained be in the hands of the plaintiff, the court will not order judgment to be entered because cases have not been delivered, but will give leave to amend and perfect. *Codwise v. Hacker*, 74
35. A motion in arrest of judgment may be after default, and the defendant's coming in, and examining witnesses on the execution of the writ of inquiry, if it appear on the face of the record that the action is not maintainable. *Callagan v. Hallett & Bourne*, 104
36. If a cause has been duly set down on the day calendar, and, on being called, the defendant does not

- appear, nor his counsel, who is then in court, the plaintiff may take an inquest which the court will not set aside, though merits be sworn to, if the absence of the defendant's counsel be not accounted for. *Post v. Wright & Buchan*, 111
37. If a notice of motion for nonsuit be titled *versus* instead of *ad reatum*, and the affidavit rightly titled, the notice is good. *Ryers v. Hillyer*, 112
38. If there be a neglect in not proceeding to trial, the defendant must avail himself of it the first opportunity, or it will be a waiver, and subject him to costs if he afterwards move for judgment, as in case of nonsuit. *Brandt, ex dem. Ricketts, v. Buckhout*, 113
39. The rule for consolidating applies only to several actions on one policy, and does not extend to several policies on one risk, though the question be the same on all, for the contracts are several. *Camman v. United Ins. Co.*, 114
40. If the defendant has joined in a commission, the court will not, on the plaintiff's application, vacate the rule by which it was granted, but will grant one to proceed to trial, notwithstanding the commission. *Shuter v. Hullett*, 115
41. The court will not discharge, on motion, a person arrested, whilst attending a reference under an order of the common pleas, if there be no notice of motion, but will only grant a rule to show cause. *Grover v. Green*, 115
42. When a defendant commits a crime for which he is sentenced to the state prison, the plaintiff may discontinue without payment of costs. *Lackey & Briggs v. M'Donald*, 116
43. If a plaintiff get relieved from his own stipulation, he restores the defendant to all rights as he stood when the stipulation was entered into. *Malin v. Kinney*, 117
44. On *sci. fa.*, notice of entry of the rule to appear and plead need not be given, as the *sci. fa.* is notice of itself, and the default may be entered on the expiration of the rule, but judgment cannot be entered till four days after. If it be, judgment will be set aside, and the default, if regular, stand. No default ever set aside when regular, except when accounted for to the satisfaction of the court. *Spencer v. Webb*, 118
45. In partition, if the defendant does not appear, the court will, on motion, make an order for partition as prayed for. *Neilson v. Cox et al.*, 121
46. To change the venue in a transitory action special cause must be shown. *Woods v. Van Rankin*, 123
47. If several actions, turning on the same point, be noticed for trial, and on the hearing of the first, the judge direct a nonsuit, exceptions to which is taken by the counsel for the plaintiff, he will not be liable to judgment, as in case of nonsuit, for not proceeding to trial on the other causes, nor be obliged to stipulate, and costs must abide the event of the suit. *Campbell v. Munger*, 129
48. If a party to a suit referred cannot produce his witness by the time of hearing, a judge at chambers, or the court, if sitting, will stay proceedings. The defendant's attorney having nominated referees, and the party not having objected, cannot, on that ground, move to set aside the report. *Combs v. Wyckoff*, 147
49. If an indictment be removed from the sessions into the supreme court, any exceptions may be taken to the charge of the judge by making a case, and bringing it before the court in the same manner as in civil proceedings. *The People v. Crowell*, 149
50. If a plaintiff notice his cause for trial, and afterwards countermand it, he must pay the defendant the intermediate costs of *subpoenaing* his witnesses. *Jackson v. Mann*, 123
51. Notice to refer must contain the names of the referees. Misapprehension of a rule; or ignorance of a late determination, may be offered as excuses for not noticing for the first day of term. If the ground of opposing a reference be that a point of law will arise, it ought to be expressly stated what it is, and that it is as advised by counsel. *Lusher v. Walton*, 149
52. In order to be admitted as a defendant in ejectment, a privity must be shown between the applicant and the tenant; it is not enough that the party claims title and has a real and substantial defence. *Jackson, ex dem. Winter, v. M'Evooy*, 151
53. Sudden indisposition of counsel and attorney, is an excuse for not proceeding to trial, but will not exempt from costs. *Jackson, ex dem. Rodman, v. Brown*, 153
- 53a. A motion cannot be extended

- to objects not specified in the notice. *Alexander v. Esten*, 152
54. Nine days' notice is enough in Cayuga, to produce papers in Albany, distant 180 miles. *Jackson, ex dem. Watson, v. Marsh*, 153
55. Whenever a plaintiff amends his declaration, the defendant has an election to plead *de novo*. *Webb v. Wilkie*, 153
56. All irregularities are waived by a defendant if he appear on trial. On judgment for nonsuit, *nisi*, the defendant should make a demand of his costs, with a copy of his rule annexed, and if not paid within twenty days, he may enter judgment, and if he do not so, the plaintiff will be regular in noticing for trial. *Gilliland v. Morrell*, 154
57. When proceedings have been regular, a mere affidavit of merits is not sufficient to set them aside. In such case, if there has been a mistake, on which the judgment has been taken, the defendant will be relieved only on costs and terms. *Cogswell v. Vanderberg*, 155
58. On a reference, if a receipt given after the rule made be offered in evidence on the part of the defendant, and objected to by the plaintiff, the special matter and facts should not be returned to the court; but the referees should admit the evidence, and make the report on it, that the party aggrieved may bring it fully before the court. *Quære*, if a special matter of fact, without a decision, be in any case a report within the meaning of the rule. *Hawkins v. Bradford*, 160
59. When a plaintiff resists a motion for judgment, as in case of nonsuit, for not proceeding to trial, if he insists on not having been able to try his cause, and others have been heard, he must show they were older issues. *Jackson, ex dem. Williams, v. Chamberlin*, 171
60. If a witness has been in the power of a plaintiff, he must show endeavors to obtain his testimony, or he will not be allowed to urge the want of it for not proceeding to trial. Counter affidavits to those in opposition are not admissible. If a suit be called and passed, the reasons why should be made appear by the counsel in the cause. If an offer of a compromise be made to the plaintiff and refused, on a motion for a nonsuit, the court will not order him to be imposed, *ut semb.* *Deas v. Smith*, 171
61. If an alien, on removing his suit into the federal court, file his petition at the time of filing special bail, he is in season, though the bail have been excepted to. *Arjo v. Monterio*, 248
62. After service of a declaration in ejectment on a tenant, though it may be a totally informal one, yet it is sufficient to set him on inquiry; and if a rule to show cause why the plaintiff should not amend be granted, fixing it in the clerk's office is good service on the tenant. If proceedings be commenced for lands, to which a title has been awarded by the commissioners for settling disputes relating to lands in Onondaga within three years after, it is sufficient, and though they may be faulty, and require amendment after the three years, it is sufficient to entitle the plaintiff to proceed. *Jackson, ex dem. Hogeboom v. Stiles*, 249
63. A motion cannot be made to set aside a writ of inquiry in the possession of the plaintiff not returned, and on which no inquisition has been taken; but if a jury has been empanelled on it, and has given a verdict on a hearing, contrary to the terms of a written agreement, the court will give leave to issue a writ of inquiry *de novo*. *Abeel v. Walcott*, 250
64. After six years' service of a declaration in ejectment, the court will, on terms, give leave to amend. *Jackson, ex dem. Finch, v. Kough*, 257
65. The defendant in error cannot *nonpross* the plaintiff's writ before it is returned. *Van Der Mark v. Jackson, ex dem. Ostrander*, 251
66. If a defendant move for judgment of nonsuit, contrary to good faith, the court will make him pay the costs of opposing. *Phelps v. Eddy*, 252
67. Service on the agent of an attorney plaintiff is as good as in any other suit, and need not be on the plaintiff personally. *Russell v. Ball*, 252
68. If cross suits be referred to the same referees, and they make up their report in each on the idea that the one shall be a set-off to the other, the court will set aside both, if the suits be for demands which cannot legally be set off. *Lyle v. Clason*, 323
69. If a plaintiff give notice of motion to set aside a judge's certificate

- to stay proceedings, and do not attend to argue, the defendant will be allowed costs. In no case will the court hear an argument to set aside a judge's certificate to stay proceedings, *ut semel*. *Brett & Bunn v. Hood*, 342
70. Affidavit of service on a person in an attorney's office, must show that there is a relation between him and the party served. *Rathbone v. Blackford*, 342
71. When the notice and all the papers are titled *versus* instead of *ad sectam*, it is fatal. *Parkman v. Sherman*, 344
72. Amendments to a case made must be in the case served, or refer to the line and page in which it is proposed to amend. The party served cannot draw up a new case. *Milward v. Hallett*, 344
73. Where there are some good counts and some bad, and a general verdict on the whole, if the evidence has been on the good counts only, the verdicts may be amended from the judge's notes after notice in arrest of judgment. *Union Turnpike Company v. Jenkins*, 381
74. If a defendant has been prevented by adverse winds from showing cause against a rule for a criminal information, and the same has been made absolute against him for want of cause shown, it will be set aside of course on an immediate application. *The People v. Freer*, 394
75. The regular mode of showing that evidence applies to one count only, or to any particular counts, is by certificate from the judge; though, if he be on the bench, and an affidavit be made which states the facts as they are, and he assents to them, it will be sufficient. *Union Turnpike Company v. Jenkins, n.*, 394
76. Though the act of God be the cause of not proceeding to trial according to notice, yet if there be time to countermand, and the plaintiff neglects to do so, he must pay costs. *Jackson v. Brown*, 484
77. On certificate of probable cause, both parties may notice, but if not done by the party obtaining the certificate, it is no cause for discharging the order. *Kirby v. Cogswell*, 484
78. On a rule to show cause why an attachment should not go for a contempt in publishing matter reflecting on the court in a cause then pending, the defendant should appear in person on the day of showing cause. *The People v. Freer*, 485
79. Causes which have been noticed for argument, and duly entered in one term, are not, without a new notice to the clerk, carried over to the next. *Livingston v. Rogers*, 487
80. On a feigned issue from chancery, if an inquest be improperly taken, relief must be sought here. If an inquest be taken by default at a circuit, and notice of trial has not been given, it will be set aside with costs to be paid by the plaintiff's attorney. *Dem v. Fen*, 487
81. The action for a return of premium must be against the underwriter and not against the broker, though the assured be himself an underwriter, and the broker employed by both parties. *Bowme v. Neilson & Dunker*, 489
82. In an action on a promissory note, if in consequence of the plaintiff's attorney having no agent in Albany, the suit be *nonprossed* there for want of declaring, and judgment by default be obtained in New York, and the damages assessed by the clerk, endorsed on a note, the court will, when the costs of *nonpross* have been paid, and the judgment in New York vacated, order the damages assessed and endorsed to be struck out, that the plaintiff may proceed in a second action without any embarrassment from the former proceedings. *Atterbury v. Teller*, 495
83. A new *nisi prius* record allowed to be filed, and a *postea* endorsed thereon, according to a judgment of six years antecedent, and execution thereon upon affidavit, showing the probable loss of the originals. *Jackson v. Hammond*, 496
84. In ejectment, on a motion to set aside the rule to appear and enter, &c., if the application be founded on irregularities, to be supported by inspection of the declaration, &c., on file, and the plaintiff produce affidavits of due service, &c., it will be presumed that all was regular, the tenant not producing the declarations and notices served, especially if, by granting the motion, the statute of limitations would attach. *Jackson v. Stiles*, 501
85. If a defendant obtain a rule for a commission, in which the plaintiff does not join, and a term elapse without notice of any proceedings under it, the court will so far vacate the

- rule as to permit to go to trial notwithstanding the commission. On a commission to England, and eight months without any return, the court will permit to go to trial; but this does not prevent showing cause on the trial why it should not be put off. *Kirby v. Watkins*, 503
86. If the consent rule, &c., in ejectment, have been actually forwarded in time to deliver to the attorney of the plaintiff, and be by mistake filed in the clerk's office instead of being served, the court will set aside a judgment on such a default, and if a writ of possession has issued, award restitution on payment of costs. *Jackson v. Stiles*, 503
87. A judge's certificate of probable cause does not stay proceedings, unless accompanied with notice of motion. *Kirby v. Cogswell*, 505
88. If a prisoner in custody on meane process sign a warrant of attorney, the nature of which is explained to him by an attorney who does not witness it as his attorney, the court will not set it aside, *ut semb. Manhattan Company v. Brower*, 511
89. Where it is necessary only to endorse an appearance on the writ, bail not being required, it is the duty of the clerk of the court to enter the appearance on record. If judgment be signed before it is so entered, the court will order the appearance to be entered *nunc pro tunc*. *Hess et al. v. Hubble et Ux.*, 512
90. Where a suit has been consolidated, and a commission sued out in the consolidated cause, in which the defendant has joined, the court will allow the evidence taken under it to be read on the trial of the principal suit. *Waterbury v. Delafield*, 513
91. Where a plaintiff has neglected to file a *capias* and enter an appearance for two terms, though there be an affidavit, swearing to an agreement that all the proceedings should be considered as of a third term antecedent, the court will not give leave to file the *capias* and enter the appearance, *nunc pro tunc*, as of the third term passed, especially if it appear that it be asked with a view to prevent a set-off of a note falling due since the third and before the second term, but will order the *capias*, &c., to be entered as of the second term. *Gordon v. Bowne*, 513
92. If a defendant be discharged for want of being duly argued in execution, he can never be taken in execution on a *ca. sa.* issued on the judgment in the suit on which he was in custody. *Masters v. Edwards*, 515
93. Three months are sufficient for executing and returning a commission arrived in London. If after a commission issued, the plaintiff do not use diligence, the defendant may apply for judgment as in case of nonsuit, which will be granted, unless the plaintiff stipulate. *Coles et al. v. Thompson*, 517
94. After verdict and certificate of probable cause granted, the court will not order the amount of the sum recovered to be brought into court. *Shuter v. Hallett*, 518
95. If there be one good count, and the others bad, and entire damages assessed, it may be amended. *Livingston v. Rogers*, 523
96. If the declaration in a justice's court be for ten dollars, and the judgment for fifteen, it is fatal on error. *Delameter v. Borland*, 523
- See ACTION, 2; CERTIORARI, 1; COMMISSION, 1; COGNOVIT; DEMURRER; INSOLVENT, 1; INTRUSION, 1; JUSTICES' COURT, 2; PARTNERS AND PARTNERSHIP, 2; STRUCK JURY; TRESPASS, 2; VENUE.
- PREMIUM.
- See PRACTICE, 81.
- PRESUMPTION.
1. A conveyance will be presumed after fifty years, where there has been a right to claim a deed, and the possession has for that time gone with the right. *Van Dyck v. Van Bueren & Vosburg*, 84
- See PARTNERS AND PARTNERSHIP, 2
- POSSESSION, 1.
- PRINCIPAL.
- See AGENT.
- PRISONER.
1. No intetest is allowed to run on.

a judgment against a prisoner in execution, to impede his discharge under the insolvent law. *Ex parte Caskaden*, 846

See PRACTICE, 26, 88, 92.

PRIVILEGE.

1. A mate having privilege in a cargo cannot, after a sale of the whole by the consignee, pick out any specific parts, and sell them. *Heyl v. Burding*, 14

See TROVER, 1.

PROCLAMATION.

See PRACTICE, 23.

PROFITS.

See AGENT, .

PROMISES.

See ASSUMPT.

PROMISSORY NOTE.

1. If a man borrow a note of another, and give his accountable receipt for it, when the note is settled the accountable receipt should be taken up, or it may be given in evidence in an action for money lent and advanced, or for money had and received. *Hart v. Hosack*, 25

2. An endorsee of a firm of which he is a member, may, on an endorsement made by himself in the name of the firm, maintain an action against the maker of a promissory note. *Kirby v. Cogswell*, 505

See AGREEMENT, 1; BILL OF EXCHANGE; CORPORATION, 1; EVIDENCE, 1, 9; ENDORSEMENT; LIMITATION, 1; PARTNERS AND PARTNERSHIP, 1, 2; PRACTICE, 82; VERDICT, 2; WITNESS, 5.

PROVISIONS.

See AVERAGE, 2.

PUBLICATION.

See LIBEL.

PUBLIC PROSECUTIONS.

1. A public prosecution must be at the expense of the prosecutor, unless, on disclosure of his circumstances, the court find him an object of public charity. *Ex parte Manning*, 86

R.

RECEIPT.

See PRACTICE, 58.

RECORD.

See ESCAPE, 1; INDUCTION, 1; PROPLE, 1; PRACTICE, 3, 30, 83; VERDICT, 1.

REFERENCE AND REFERENCES.

See PRACTICE, 5, 41, 48, 51, 8, 1.

REGISTER.

See INSURANCE, 15.

RELEASE.

See WITNESS, 1.

REPORT.

See REFERENCE AND REFERENCES.

REPRESENTATION.

See CONCEALMENT; INSURANCE, 10.

RE-RESTITUTION.

See FORCIBLE ENTRY AND DETAINER, 1

RESTITUTION.

1. If a man be turned out of pos

seamen by a mistake in executing a writ of possession against him instead of another, the court will, on motion, order restitution. *Reynolds, ex parte*, 500

See INSURANCE, 16; PRACTICE, 86.

RETURN.

See SHERIFF, 1; WITNESS, 7.

ROADS.

See TURNPIKES.

RULES, ENTRY OF.

See PRACTICE, 2, 44.

RULES OF COURT.

1. Rules in partition. *Seaman v. Davenport*, 7; *Neilson v. Cox*, 121
2. Rule as to non-enumerated and enumerated motions, 194
3. Rules as to admission of persons as counsellors, 194

S

SCIRE FACIAS.

See PRACTICE, 44.

SEAWORTHINESS.

1. If the facts given in evidence manifestly show a want of seaworthiness, and the jury find against him, the court will set aside the verdict, notwithstanding the jury, at the time of giving, declare they rest their decision on the whole matter in evidence. *Mumford v. Smith*, 520

See INSURANCE, 1, 8, 11, 12.

SEISIN.

See ESTOPPEL, 1; FORCEIBLE ENTRY AND DETAINER, 1; INTRUSION, 1; PEOPLE, 1; VENUE, 1.

SEIZURE.

See JUSTIFICATION, .

SERVICE.

See PRACTICE, 31, 32, 62, 67, 70.

SESSIONS.

See INDICTMENT, 1.

SET-OFF.

See PRACTICE, 68.

SEVERANCE IN PLEADING.

See PRACTICE, 13.

SHERIFF.

1. A former sheriff, after a lapse of five years, will not be ordered to amend his return, according to the truth of the case, by stating that the defendant had escaped from prison, if it was at the time when many others forcibly broke out. *Potter v. Briggs*, 57
2. The court will not grant a rule against a sheriff to show cause why an information should not be filed against him for false swearing, on a plea of retaking and fresh pursuit, if it appear that the prisoner had before broken his bonds, and an action be pending for the escape. *The People v. Dole*, 181
3. If a levy be made on lands, the sheriff will be entitled to his poundage on the sum endorsed, though, in consequence of a compromise, he do not sell. *Hildreth v. Ellice*, 192

See ESCAPE, 1, 2; PRACTICE, 11.

SHIPOWNER.

See CARRIER, 1; INSURANCE, 11.

SLANDER.

1. In slander, for saying of the plaintiff that he was perjured, and a particular perjury pleaded in justification

the court will, on affidavit of the absence of the witness, by whom it was to be proved, give leave to amend by pleading another perjury, on payment of costs. *Graham v. Woodhull*, 497

See ACTION, 2; STRUCK JURY, 1, 2.

SLIPAGE.

See CORPORATION, 2.

STAY OF PROCEEDINGS.

See PRACTICE, 48, 69, 77, 87, 94.

STAKE.

See EVIDENCE, 9.

STAMP.

See INSOLVENT, 1.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STIPULATION.

See PRACTICE, 4, 43, 47.

STRIKING OUT COUNTS AND DEMISES.

See PRACTICE, 15.

STRUCK JURY.

1. If a cause be important or intricate, it is a cause for a struck jury. But the cause ought to be at issue *ut verba*, and if the action be for words, the truth of them ought to be denied. *Spencer v. Sampson*, 498

2. For want of these circumstances, a struck jury denied. *Foot v. Cronwell*, 498

SUPERCARGO.

See INSURANCE, 11.

T

TENANT IN COMMON.

See POSSESSION, 1.

TENDER.

See AGREEMENT, 1; INSURANCE, 11
PLEAS AND PLEADINGS, 1.

TITLE.

See EJECTMENT, 1.

TITLING CAUSES AND PLEADING.

See PRACTICE, 13, 37, 71.

TOLLS.

1. Under the act incorporating the first company of the great western turnpike road, the toll is payable though the person has travelled the road less than ten miles. *Stuart v. Rich*, 182

TRAVERSE.

See FORCIBLE ENTRY AND DETAINER, 1.

TRESPASS.

1. Trespass will not lie against an inferior officer for executing a warrant of distress on a house liable to be assessed, though the assessment be erroneous. *Henderson v. Brown*, 92

2. If a trespass be committed in a town, which, before action brought, is subdivided, it may be laid as in the original township. *Renaudet v. Crockett*, 167

TRIAL.

See PRACTICE, 3, 47, 56; ISSUE ;
COSTS, 2.

TROVER.

1. A right of privilege in a cargo

does not give such an interest as will enable the purchaser of it to maintain trover, if the consignee has not assented to the selection of those parts which are purchased. *Hayl v. Burling*, 14

2. Trover rests upon property and possession. *Id.*

TRUST.

1. A trust in a will arises on the word "desire." *Van Dyck v. Van Beuren & Vostburg*, 84

TURNPIKES.

See CORPORATION, 1; TOLLS, 1.

1. If a turnpike act give the company power to erect a gate near a particular spot, they may place it on the very intersecting spot of an old road, so as the gate be but near the place designated: for near is not nearest. *People v. Denlow*, 177

U

USURY.

See WITNESS, 4.

V

VENIRE.

1. If the court of errors award a *venire de novo*, it must be issued out to warrant a second trial. If the cause be tried without, it is a defect of record, not amendable, and fatal in arrest of judgment. But a motion may be made for an award of the *venire* awarded. The court of errors has not any authority to award a *venire* out of this court. *Livingston v. Rogers*, 583

See ACTION, 2.

VENUE

1. The venue will be changed to

where lands lie in an action on a covenant of seisin. *Clarkson v. Gifford*, 5

2. The venue will be changed in action on a promissory note, if there be no opposition. *Allen v. Grace*, 107

3. The court will not charge the venue on an affidavit, saying there is a party spirit in the country against the person applying. *Zobieski v. Bauder*, 487

See ESCAPE, 1; PRACTICE, 46.

VERDICT AND SPECIAL VERDICT.

1. On a special verdict the court will not intend anything which is not found. *Jenks v. Hallett & Bowne*, 69

See PRACTICE, 10, 12, 63, 73, 94; SEAWORTHINESS, 1.

W

WAGER.

See EVIDENCE, 9.

WAGES.

See AVERAGE, 2.

WAIVER.

See BREACH OF ORDERS, 1; INSURANCE, 11, 13, 14; PRACTICE, 4, 22, 56.

WARRANTY.

See INSURANCE, 5, 8, 12, 15, 17, 18, 20.

WARRANT OF ATTORNEY.

See PRACTICE, 88

WILL.

See TRUST, 1

WITNESS.

1. A witness released after his deposition taken, will not make his deposition evidence. *Heyl v. Burling*, 14

2. A professional man, not employed by a party, is a good witness against him, though his knowledge be derived in the course of business. *Hoffman & Seton v. Smith*, 157

3. A surveyor, acting under an appointment by an attorney, is a good witness without producing his appointment. An agent who has promised to refund money received on account of his principal, in case a verdict pass against him in any particular suit, is a good witness in that very suit. *Renaudet v. Crocker*, 167

4. In a *qui tam* action, under the statute of usury, brought after a lapse of a year, to recover the excess interest paid, the borrower, after having discharged the principal, is a good witness. *Petingal v. Brown*, 169

5. An attorney in a suit may be examined as a witness, to prove the state of an instrument when put into his hands. An endorser of a note is a good witness to prove the endorse-

ment made after the money was due. *Baker & Rowleson v. Arnold*, 258

6. A witness who has an order to be paid out of the sum to be recovered in a suit, drawn upon the agent who is to receive such sum, is not a competent witness, though the order is not accepted. *Peyton v. Hallett*, 363

7. If a justice admit a plaintiff to testify in his own cause, the court will grant a rule or certiorari to have that matter returned, as the party applying may be advised. *Durkee v. Brackett*, 501

See PRACTICE, 60, 88.

WORDS.

See ACTION, 2; SLANDER.

WRIT.

See EVIDENCE, 3; PRACTICE 29.

WRIT OF INQUIRY.

See INQUEST.



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